TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 442.

ALFRED W. CARTER, GUARDIAN OF THE PROPERTY OF ANNIE T. K. PARKER, A MINOR, PLAINTIFF IN ERROR,

vs.

GEORGE D. GEAR, SECOND JUDGE OF THE CIRCUIT COURT OF THE FIRST CIRCUIT TERRITORY OF HAWAII, ET AL.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

FILED NOVEMBER 28, 1904.

(19,542.)

(19,542.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 442.

ALFRED W. CARTER, GUARDIAN OF THE PROPERTY OF ANNIE T. K. PARKER, A MINOR, PLAINTIFF IN ERROR,

vs.

GEORGE D. GEAR, SECOND JUDGE OF THE CIRCUIT COURT OF THE FIRST CIRCUIT, TERRITORY OF HAWAII, ET AL.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

INDEX.

	Original.	Print.
Writ of prohibition	1	1
Petition for writ of prohibition	3	2
Exhibit A—Amended motion and petition of Annie Thelma K. Parker, by her next friend, J. S. Low, to remove A. W. Carter as guardian	8	5
B—Decision on objection to jurisdiction in the matter of the guardianship of Annie T. K. Parker	23	14
Summons	28	16
Return of service	28½	17
Answer of Geo. D. Gear, second judge	29	17
Answer of J. S. Low	31	18
Request for a substitute justice	32	19
Clerk's minutes	33	19
Opinion	36	21
Decree	53	31

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 9, 1904.

	Original.	Print
Petition for leave to amend	54	31
Order allowing amendment	55	32
Motion to advance	56	32
Affidavit of J. Alfred Magoon	57	33
Petition for writ of error	59	35
Order allowing writ of error	61	36
Writ of error (copy)	62	37
Assignment of errors	64	38
Bond on writ of error	67	40
Citation (copy)	69	41
Clerk's certificate	71	42

1 In the Supreme Court of the Territory of Hawaii.

In the Matter of the Application of ALFRED W. CARTER, Guardian of the Property of Annie T. K. Parker, a Minor, for a Writ of Prohibition against the Honorable George D. Gear, Second Judge of the Circuit Court of the First Circuit, at Chambers, and J. S. Low, Next Friend of Annie T. K. Parker, a Minor.

($2. stamps.)

Writ of Prohibition.

The Territory of Hawaii to the Honorable George D. Gear, second judge of the circuit court of the first circuit, at chambers, and J. S. Low, next friend of Annie T. K. Parker, a minor, Greeting:

Upon reading the annexed petition of A. W. Carter, guardian of the property of Annie T. K. Parker, a minor and it appearing to me that a writ of prohibition should issue as prayed for;

Now therefore you, the said Honorable George D. Gear, second judge of the circuit court of the first circuit, at chambers, are hereby prohibited from taking further cognizance of the "Amended motion and petition of Annie Thelma K. Parker by her next friend J. S. Low to remove A. W. Carter as guardian," and from proceeding further therein; and you the said J. S. Low next friend of Annie T. K. Parker, a minor are prohibited from proceeding further in said amended motion and petition until further order of the supreme court of the Territory of Hawaii.

And you and each of you are further commanded to appear and be before the supreme court of the Territory of Hawaii upon
2 Monday, the 3rd day of October, A. D. 1904 to show cause, if any you have, why this writ should not be made perpetual.

Witness the Honorable Walter F. Frear, chief justice of the supreme court of the Territory of Hawaii this 7th day of September, A. D. 1904.

[SEAL.] (Signed) GEORGE LUCAS, *Clerk.*

3 Let a writ issue as prayed for herein returnable before the supreme court on Monday October 3, 1904.

(S'g'd) W. F. FREAR,
Chief Justice Supreme Court.

Honolulu, T. H., Sept. 7, 1904.

In the Supreme Court of the Territory of Hawaii.

In the Matter of the Application of ALFRED W. CARTER, Guardian of the Property of Annie T. K. Parker, a Minor, for a Writ of Prohibition against the Honorable George D. Gear, Second Judge of the Circuit Court of the First Circuit, at Chambers, and J. S. Low, Next Friend of Annie T. K. Parker, a Minor.

($2. stamps.)

Petition for a Writ of Prohibition.

To the Honorable W. F. Frear, chief justice of the supreme court of the Territory of Hawaii:

Your petitioner, Alfred W. Carter, guardian of the property of Annie Thelma K. Parker, respectfully represents:

1. That petitioner is the guardian of the property of Annie T. K. Parker, a minor, petitioner having been duly appointed as such guardian by the Honorable W. L. Stanley, then second judge of the circuit court of the first circuit, Territory of Hawaii, on the 29th day of September, A. D. 1899, and at all times hereafter mentioned has been and now is the duly qualified and acting guardian for said minor as aforesaid;

2. That heretofore, to-wit, on the 27th day of July, 1904, there was filed before a circuit judge of the first judicial circuit, Territory of Hawaii, at chambers, by J. S. Low as next friend of said Annie T. K. Parker an "Amended motion and petition of Annie Thelma K. Parker by her next friend J. S. Low to remove A. W. Carter as guardian," a copy of which amended motion and petition is hereto attached, marked "Exhibit A" and made a part hereof;

3. That said amended motion and petition, though purporting to be entitled—"In the circuit court of the first judicial circuit,
4 Territory of Hawaii. In probate, at chambers" was in fact filed before a circuit judge of the first judicial circuit, sitting at chambers, to-wit, the Honorable George D. Gear, second judge of the circuit court of the first circuit, and said Honorable George D. Gear, second judge as aforesaid, sitting at chambers, as aforesaid, has taken cognizance and jurisdiction of said amended motion and petition and is proceeding in a summary manner, at chambers, to hear and determine the issues thereby presented, and has made and filed certain interlocutory decisions therein, which decisions are entitled and endorsed "Before a circuit judge of the first circuit, at chambers," and is about to proceed to a hearing of said cause upon its merits;

4. That your petitioner duly objected to the jurisdiction of said Honorable George D. Gear, second judge as aforesaid, sitting at chambers as aforesaid, upon the grounds hereafter stated, but that said objection was over-ruled by said Honorable George D. Gear in

a decision filed the 2nd day of September, 1904, a copy of which is hereto attached, marked "Exhibit B" and made a part hereof;

5. That there is no action, cause or matter pending in the circuit court of the first judicial circuit, Territory of Hawaii, or in any court of the Territory of Hawaii, or in any court elsewhere, to which said amended motion and petition is incidental or ancillary, but that said Honorable George D. Gear, second judge as aforesaid, sitting at chambers as aforesaid, in hearing and determining the matters and things alleged in said amended motion and petition is hearing and determining questions of a judicial nature entirely independent of any cause pending in any court of the Territory of Hawaii or in any court elsewhere;

5 6. That said Honorable George D. Gear, second judge as aforesaid, sitting at chambers as aforesaid, has taken cognizance and jurisdiction of said cause, and is exercising authority over the same under and by virtue of act 16 of the Session Laws of the Territory of Hawaii for 1903 and section 11 of act 32 of the Session Laws of the Territory of Hawaii for 1903, which statutes purport to confer upon the judges of the several circuit courts, at chambers, within their respective jurisdictions, jurisdiction of matters of the nature of said amended motion and petition and of other judicial matters as therein more fully set forth;

7. That said statutes and each of them and all statutes of the Territory of Hawaii purporting to confer judicial power and authority upon circuit judges at chambers to hear and determine judicial matters not incident or ancillary to any cause pending in some court, are and each of them is null and void, being in conflict with article 3, section 1 of the Constitution of the United States providing that "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish:"

8. That said statutes and each of them and all statutes of the Territory of Hawaii purporting to confer judicial power and authority upon circuit judges at chambers to hear and determine judicial matters not incident or ancillary to any cause pending in some court, are and each of them is null and void, being in conflict with section 81 of an act of Congress entitled "An act to provide a government for the Territory of Hawaii," approved April 30th, 1900, and reading as follows: "Section 81. That the judicial power of the Territory shall be vested in one supreme court, circuit courts and in such inferior courts as the legislature may from time to time

6 establish. And until the legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the several courts and their jurisdiction and procedure shall continue in force, except as herein otherwise provided;"

9. That said Honorable George D. Gear, second judge of the circuit court of the first circuit at chambers, has no jurisdiction over the subject matter of said amended motion and petition, nor over any of

the matters and things therein alleged; nor any authority under the law to grant any of the relief therein prayed for;

10. That said J. S. Low in prosecuting said amended motion and petition before a tribunal without jurisdiction thereof is putting your petitioner and the estate of said minor Annie T. K. Parker, to great and needless expense, and is causing your petitioner and the said estate great and irreparable injury, for which there is no plaim, adequate or complete remedy at law, in that your petitioner has been obliged to incur great expenses for costs and counsel fees in said matter, and if said cause is further prosecuted your petitioner will be obliged to incur further expenses for costs and counsel fees and to incur large expenses for witness fees in bringing a large number of witnesses from the Island of Hawaii to Honolulu and otherwise be put to great expense;

Wherefore your petitioner prays that a writ of prohibition may issue forthwith, addressed to the Honorable George D. Gear, second judge of the circuit court of the first circuit, at chambers, and to J. S. Low as next friend of Annie T. K. Parker, prohibiting said Honorable George D. Gear from taking further cognizance of said amended motion and petition of Annie Thelma K. Parker by her next friend J. S. Low to remove A. W. Carter as guardian, and prohibiting said Honorable George D. Gear and said J. S. Low as next friend of Annie T. K. Parker, a minor, from proceed-
7 ing further therewith until further order of the supreme court of the Territory of Hawaii

Dated, Honolulu, September 7th, 1904.

(Signed) ALFRED W. CARTER,
Guardian of the Property of Annie T. K. Parker, a Minor.

BALLOU & MARX,
Of Counsel for A. W. Carter, Guardian.

HONOLULU, OAHU, } ss:
Territory of Hawaii, }

A. W. Carter being duly sworn on oath deposes and says that he is guardian of the property of Annie T. K. Parker, a minor, and petitioner in the above entitled cause; that he has read the foregoing petition and knows the contents thereof, and that all and singular the matters and things therein alleged are true to his own knowledge.

(Signed) ALFRED W. CARTER.

Subscribed and sworn to before me this 7th day of September, A. D. 1904.

(Signed)
[SEAL.] A. M. McBRYDE,
Notary Public, First Judicial Circuit.

8 EXHIBIT "A."

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. In Probate. At Chambers.

In the Matter of the Guardianship of ANNIE T. K. PARKER, a Minor

Amended Motion and Petition of Annie Thelma K. Parker, by Her Next Friend, J. S. Low, to Remove A. W. Carter as Guardian.

Now comes Annie Thelma K. Parker, a minor, by J. S. Low her next friend, and shows to your honor:

I.

That Martha Fuller Low, mother of said J. S. Low, is the first cousin of Samuel Parker; that said Samuel Parker is the grandfather of Annie Thelma K. Parker, hereinafter referred to as "minor," over whose property A. W. Carter was appointed guardian on the 25th day of September, A. D. 1899, and duly qualified and is still such guardian.

II.

That John P. Parker, hereinafter referred to as "John P. Parker the younger," was the son of said Samuel Parker and the father of said minor, and he and said J. S. Low were reared together in the home of one John P. Parker, hereinafter referred to as "John P. Parker the elder," and grew from childhood to manhood together,
9 and were as fond of each other as though they were brothers.

III.

That said J. S. Low by reason of the relations aforesaid has always taken a great interest in the affairs of said minor.

IV.

That said J. S. Low has examined the accounts of said A. W. Carter as guardian of said minor, heretofore filed in the circuit court of the first judicial circuit, and has discovered that said A. W. Carter has charged said minor commissions at the rate of 10%, 7% and 5% on the gross income of the estate of said minor; that while said J. S. Low is informed that the commissions charged as aforesaid are the statutory commissions, yet, in view of the large amount of income of the estate (the commissions of said A. W. Carter amounting for the year ending 1903 to $2,091.48), the amount charged is in excess of the value of the services actually rendered; that petitioner is informed and believes and upon such information and belief alleges and avers

that reputable and responsible business men in the city of Honolulu will do the same work for a commission not to exceed 5%, and petitioner believes that a competent and reliable person can be secured to do it for 3½%, and that said A. W. Carter is only charging 3½% on gross income for almost similar services.

V.

That said John P. Parker the elder and said Samuel Parker carried on as partners a ranch business, known as the Parker ranch, and that said John P. Parker the elder died about thirteen years ago; that since his death said Samuel Parker has carried on the business of said partnership.

10

VI.

That nearly all of the income of said minor is derived from said partnership in said Parker ranch, of which the said Alfred W. Carter has had, for several years last past, the charge and control, and that said A. W. Carter has charged on the gross income from said ranch a commission of 3⅓%, so that not only does said A. W. Carter charge the statutory commissions of 10%, 7% and 5% as aforesaid, but in addition thereto obliges the said minor to pay 3⅓% on the entire amount of her share of the gross income from said ranch, making his commissions exceed 13⅓%, 10⅓% and 8⅓%; that 3⅓% is also an excessive amount for said A. W. Carter to charge for looking after the business of said ranch.

VII.

That said A. W. Carter during all the time he has had the charge and control of said ranch has had his home in Honolulu, and has been several times absent from the Hawaiian islands, and for several years last past has had his brother, F. W. Carter, in the actual management of said ranch under a salary; that said F. W. Carter is incompetent to perform the duties required, and has, as petitioner is informed and believes, mismanaged the affairs of said ranch, and with the full knowledge of said A. W. Carter in the following particulars:—

(1.) That A. W. Carter employed his brother, F. W. Carter as bookkeeper of the said Parker ranch, well knowing that he, said F. W. Carter, was incompetent and did not understand bookkeeping, and not able to keep the accounts of said ranch in a proper manner.

(2.) That said A. W. Carter employed said F. W. Carter as manager of the said ranch well knowing that he, said F. W. Carter,

11 was not a ranch manager, and had not had sufficient experience in managing ranches like the one in question, to justify him, said A. W. Carter, in employing said F. W. Carter as such manager, and that said F. W. Carter was not and never has been a proper manager for the said ranch, and that by reason of his mismanage-

ment in the premises, extending throughout the entire term of his management of the said ranch, he has caused great injury to the ranch property and loss to the said minor.

(3.) That said F. W. Carter is not a proper person to have the charge and management of the said ranch, or the control thereof, for the reason that he was not, at the time that he assumed charge and control of said ranch an experienced ranchman, and did not understand the nature of the business entrusted to him, and did not, and has not, since his appointment, properly conducted the affairs of said ranch, but on the other hand has improperly conducted the same, and is lazy, indolent and wasteful, and by reason of his improper, inefficient, and unbusinesslike methods said ranch has greatly suffered, and said minor has been subjected to great loss and injury.

(4.) That said A. W. Carter is an improper person to have the management and control of said ranch, for the reason that he is now very largely interested in a ranch similar in character, to-wit, the ranch of the American Sugar Company, Limited, carrying on business on the island of Molokai, where his interests must necessarily clash with his duties with reference to said Parker ranch, and where his duties as guardian of said minor came in conflict with his own interests in the matter of the said American Sugar Company, Limited.

(5.) That said A. W. Carter and his said agents have failed to fence off and protect the forests and source of water supply of the said Parker ranch.

(6.) That said A. W. Carter and his said agents have failed to provide sufficient paddocks for properly carrying on the business
12 of said ranch.

(7.) That said A. W. Carter and his said agents have failed to provide sufficient chutes and appliances to properly handle stock on said ranch.

(8.) That said A. W. Carter and his said agents have failed to keep the buildings on said ranch in repair.

(9.) That said A. W. Carter and his said agents have failed to take proper care of the cisterns at Mana on said ranch, and have failed to supply a pump for serving water to the stock from said cisterns, and have exposed the water of said cisterns to contamination and filth, so that the same has become unfit for use by man or beast.

(10.) That said A. W. Carter and his said agents have maintained a pond called Pelekuaia, in an insanitary, filthy and unhealth- condition, in consequence of which animals on said ranch have been injured and many have died, and said pond is a constant menace to the health of said livestock on said ranch.

(11.) That said A. W. Carter and his said agents have laid water pipe lines on the lands of said ranch in an improper and unskillful manner, and in consequence thereof the same are frequently out of repair and broken.

(12.) That said A. W. Carter and his said agents have failed to properly care for the carts, tools and implements and other personal property of the said Parker ranch, and have left them out in the open exposed to the sun and the rain.

(13.) That said A. W. Carter and his said agents have allowed gates, hinges, etc., to remain out in weeds and grass to rot for more than a year at a time, after the same have been made and ready to be put in place.

(14.) That said A. W. Carter and his said agents have given frivolous and contradictory orders to the men, and much
13 valuable time has thereby been wasted at a great loss to the said ranch.

(15.) That said A. W. Carter and his said agents have pursued unsystematic business methods with reference to the said ranch, whereby the operations of said ranch have been impeded and unsuccessful, entailing a great amount of injury and waste of time, and in consequence of which the work on said ranch could not and did not proceed in an effective, judicious and economical manner.

(16.) That said A. W. Carter and his said agents have improperly herded and driven the neat stock on said ranch, in consequence whereof large numbers have been injured and killed.

(17.) That said A. W. Carter and his said agents have confined the said neat stock on said ranch in improper places where they have had neither food nor water, and in consequence thereof large numbers have died.

(18.) That said A. W. Carter and his said agents have failed to brand a large number of the neat stock on said ranch, and have not taken proper precaution to prevent inbreeding.

(19.) That said A. W. Carter and his said agents have improperly castrated the bulls on said ranch, whereby large numbers have been injured, and in consequence thereof large numbers have died.

(20.) That said A. W. Carter and his said agents have improperly spayed cows belonging to the said ranch, and have spayed such cows in such an improper and unskilful*l* manner that large numbers have died in consequence thereof.

(21.) That said A. W. Carter and his said agents have slaughtered and sold to be slaughtered large numbers of cows in calf and thereby deprived said ranch of a large portion of the natural increase
14 of its herd of neat stock; and have slaughtered animals in a barbarous and disgusting manner, and without proper facilities.

(22.) That said A. W. Carter and his said agents have carried on the business of driving and caring for the neat stock on the said ranch more in the nature of a sport than of serious work, the operation of lassoing said neat stock and the treatment of them in the pens being look*ing* forward to as a general gala day in the district where the same has been carried on, greatly to the injury of said stock.

(23.) That said A. W. Carter and his said agents have conducted

the dairy at Mana on said ranch in an unsanitary and offensive manner, milking the cows in open, with the mud in places up to their bellies, with udder all besmeared with mud, and have failed to provide proper facilities for milking and caring for said cows, many going unmilked, in consequence of which cows have been separated from their calves, and many cows have suffered and many cows have died, and have conducted the said dairy without proper inspection, and with unskilled, unintelligent and improper labor.

(24.) That said A. W. Carter and his said agents have failed to provide proper paddocks and facilities for treating sick and diseased animals, and have allowed sick and diseased animals to herd with healthy ones.

(25.) That said A. W. Carter and his said agents have failed to take proper precautions to prevent the spread of ivy, lantana, Scotch thistle, periwinkle, fox-tail, cockleburrs, lelelcihua and other noxious shrubs on the lands of said Parker ranch, and have spent money recklessly, without proper consideration, and with little or no effect in trying to exterminate the same.

(26.) That said A. W. Carter and his said agents have not given proper personal attention to matters that should properly demand their personal attention.

(27.) That said A. W. Carter and his said agents have without proper consideration, disposed of the horses belonging to said ranch.

(28.) That said A. W. Carter and his said agents have tamed horses belonging to said ranch in an improper and inefficient manner

(29.) That said A. W. Carter and his said agents have failed to properly tame the neat stock on said ranch.

(30.) That said A. W. Carter and his said agents do not give proper supervision to the work of said ranch, and have not properly instructed those in charge of different departments of ranch work, and have not received proper reports from such heads of departments, to which is largely due a large part of the inefficient conduct of the said ranch.

(31.) That said A. W. Carter and his said agents have failed to make accurate counts of the stock on said ranch, and have failed to make complete drives of said stock.

(32.) That said A. W. Carter has projected the construction of a paddock and the laying of a pipe line at large expense, and the same as projected will be of little value to the said ranch, and not commensurate with the outlay that will be incurred.

(33.) That said A. W. Carter has erected improvidently on said ranch, buildings and structures at a large expense that are of very little utility, and has wastefully used material in the construction and operation of structures and erections, and has cost more than suitable material need to have cost.

(34.) That said A. W. Carter and his said agents have failed to take proper measures to exterminate wild dogs that pray upon the animals of said ranch.

16 (35.) That said F. W. Carter has been frequently under the influence of intoxicating liquor during working hours, and thereby incapacitated himself from properly attending to the work of said ranch, and has likewise frequently absented himself from the work of said ranch for the purpose of gratifying his own personal pleasures.

VIII.

That said A. W. Carter has failed to protect the interests of said minor with reference to her property in the following manner:

(A.) A portion of the property of said minor consists of about 1700 acres of land, known as the land of Paauhau, situate in Hamakua, on the island of Hawaii, which is at present leased to the Paauhau Plantation Company for about $1200.00 per annum, that said lease will expire in about seven years from this time that said land at the present time is of great value to the Paauhau Plantation Company, which is desirous of purchasing the same.

(B.) That the value of said land depends very largely upon whether or not a ditch shall be constructed for the purpose of conducting the water from Waipio valley into Hamakua, crossing the lands in question, a company for which has been formed, known as the Hamakua Ditch Company, Limited, and work upon said construction must be commenced at a very early date, or the enterprise will be abandoned.

(C.) That a right-of-way for said ditch over said land for the unexpired term of the lease to said plantation company will not justify the construction of the said ditch, and said ditch will not be constructed unless some arrangement can be made whereby a permanent right-of-way for said ditch over said land can be acquired, and said A. W. Carter has refused to entertain any proposition for granting said right-of-way.

17 (D.) That said plantation company is willing, in case it purchases said land, to grant said right-of-way.

(E.) That petitioner is informed and believes and upon such information and belief alleges and avers that said plantation company recently made application to said A. W. Carter to purchase said land, and said A. W. Carter in consequence of said application went to inspect said land, and after having made inspection thereof returned to Honolulu and made a verbal offer to sell said land to said plantation company for the sum of $124,000; that thereupon said offer of $124,000. was accepted whereupon said A. W. Carter imposed another condition, namely, that he would sell only in case he could purchase the interest of said Samuel Parker in said partnership or Parker ranch.

(F.) That petitioner believes that this condition was imposed with the expectation that influence could thereby be brought to bear upon said Samuel Parker to sell his said interest for less than its actual value, for the reason, as petitioner also believes, said A. W. Carter supposed that said Samuel Parker was largely interested in said

ditch company, and in order that said ditch could be constructed, said Samuel Parker would sacrifice his interest in said ranch.

(G.) That the conditional acceptance of said sum of $124,000.00 being unreasonable and not within the power of said plantation company to comply with, the sale of said Paauhau land was not consummated.

(H.) That said price which said A. W. Carter agreed to accept for said Paauhau land was a very high price for the same, for the reason that as good or better land in or near the same locality in small lots, sells for $40.00 and less per acre.

18 (I.) That said sum of $124,000. if put out at interest, would produce to the said ward about $7440.00 per annum, and this would increase the net annual income of her estate $6240.00.

(J.) That in addition to the above reasons for the sale of said land as aforesaid, petitioner is informed and believes, and upon such information and belief alleges and avers that it is very doubtful if, at the end of seven years anything like $124,000. can be obtained for said land in case said ditch shall not be constructed, and deponent also believes that it will then be impossible to lease said land for a sum equivalent to the interest on $124,000., and that a large part of said land may then be valuable only as pasture land.

(K.) That petitioner alleges that said A. W. Carter has disregarded the best interests of said minor, and that said minor is being subjected annually to great loss by reason of the mismanagement of her estate in consequence of the acts of said A. W. Carter.

IX.

That on the 9th day of June, 1904, said A. W. Carter as guardian of said minor, filed in the circuit court of the third judicial circuit, Territory of Hawaii, at chambers, in equity, his bill for partition, praying, among other things, that the land held in fee and under lease by said Samuel Parker and said minor, known as the Parker ranch, be partitioned, and the cattle and other livestock depasturing thereon be divided between said minor and said Parker, and petitioner is informed and believes and upon such information and belief alleges and avers that heretofore, to-wit, on or about the 13th day of June, 1904, said A. W. Carter caused a copy of his said bill for partition to be filed in a certain suit in equity, now pend-

19 ing in the circuit court of the first judicial circuit, wherein A. W. Carter guardian of said Annie T. K. Parker is plaintiff, and said Samuel Parker, F. Wundenberg and Eben P. Low are defendants, which copy petitioner prays leave may be considered as a part of this petition, and by reference to which the matters and things hereinabove alleged on information and belief will more fully and at large appear, and petitioner further says that he is informed and believes and upon such information and belief alleges and avers, that heretofore, to-wit, on or about the 16th day of June, 1904, said A. W. Carter as guardian, procured the appointment, by the circuit

judge of the third judicial circuit, of one E. E. Conant, as receiver of said Parker ranch.

X.

That petitioner further says that a partition in kind of the said property known as the Parker ranch will be ruinous to the interests of said minor; that said A. W. Carter, unless removed from his guardianship by this honorable court will prosecute said suit for partition to final determination, and petitioner greatly fears that partition of said property may be ordered, and in that event the estate of said minor will be greatly diminished in value, and that in consequence thereof said minor will suffer irreparable injury and wrong. That the irreparable injury and wrong which said minor will suffer is as follows:

(1.) That petitioner is informed and believes and upon such information and belief alleges and avers that the lands comprising the Parker ranch have an area of about 380,000 acres, of which about 140,000 acres is owned by said minor with Samuel Parker in fee simple; that 2000 acres and over is owned by said minor; that 4000 acres and over is owned by said Samuel Parker; that about 112,000 acres is leasehold under several different leases, most of which are in the name of said Samuel Parker; that the terms of said leases expire at different times, some of said terms being very short; that a question has been raised as to whether or not the said minor has any interest at all in the said leaseholds; that so long as said Samuel Parker does not object to the use by the said ranch of the said leased property, it is immaterial whether the said leases are the individual property of said Samuel Parker or are owned jointly by said Samuel Parker and said minor; that said Samuel Parker has informed petitioner that he has no intention of disturbing the present conditions; that should said ranch be partitioned, and said Samuel Parker claim and be declared to be the sole owner of said leases, said minor would suffer tremendous loss.

(3.) That it will be impossible to divide said lands owned by said parties as tenants in common, so that each can have her and his full, fair, just and proper share thereof; that among many other reasons why it is so impossible to divide the said lands is the fact that said lands differ greatly in quality some being fattening lands and others being ordinary range lands and that it becomes necessary to take the cattle from one location to another at different seasons of the year; another reason is that said lands are very largely devoid of water, and in order to supply the stock on said ranch with water, it becomes necessary to conduct water in pipes to different paddocks for a distance of many miles.

(3.) That should the lands be ordered sold by reason of being incapable of division, or should the said leaseholds be adjudged to be the sole property of said Samuel Parker, said minor would have no land upon which to run her share of the stock of said ranch, and said stock would of necessity, have to be sold,

which could not be done except at a tremendous sacrifice and loss to said minor.

(4.) That in case said lands and stock should be partitioned in kind a very large amount of money would of necessity have to be spent in fencing said lands so divided, and a large amount of the money thus spent in fencing would be practically thrown away by reason of the fact that the leased lands, as well as the lands owned in fee simple would have to be fenced, which short term leases would not justify.

(5.) That said ranch as a whole should be a highly profitable business, and to divide it, or to sell it and divide the proceeds, would materially lessen the income that said minor should receive under proper management as her share from the ranch property conducted as a whole.

Wherefore petitioner prays that said A. W. Carter guardian of said minor be removed as such guardian, on the ground that he is an unsuitable person to act as such guardian, for that he is charging the estate of said minor with unreasonable, and extortionate commissions; that he is mismanaging the estate of said minor, and refuses to consent to a sale of certain of the real estate of said minor, when it is for the benefit of said minor that the same should be sold, and on the further ground that heretofore, to wit, on the 9th day of June, A. D. 1904, said A. W. Carter as guardian of said minor, filed in the circuit court of the third judicial circuit, Territory of Hawaii, at chambers in equity, a bill for the partition of the lands known as the Parker ranch, and a division of the cattle depasturing thereon, which partition, if allowed by said court will cause irreparable injury and mischief to the estate of said minor, and on the fur-
22 ther ground that heretofore, to-wit, on or about the 16th day of June, A. D. 1904, said A. W. Carter, guardian as aforesaid, obtained in said third circuit court, in equity, the appointment of a receiver of said Parker ranch, the appointment of which receiver will cause irreparable injury to the estate of said minor, and on all the other grounds mentioned in the foregoing petition, and for such other and further relief as to the court shall seem proper.

Dated Honolulu, July 27th, A. D. 1904.

ANNIE THELMA K. PARKER,
By her guardian *ad litem* and next friend,
(S'g'd) J. S. LOW.

CITY OF HONOLULU, }
Island of Oahu, Territory of Hawaii, } ss:

Now comes J. S. Low and being duly sworn on oath deposes and says:

That he is the next friend of Annie Thelma K. Parker, referred to in the foregoing amended petition; that he is the duly appointed guardian *ad litem* of said Annie Thelma K. Parker; that he has

read the contents of the foregoing amended petition and that the allegations therein contained as therein set forth are true, excepting as to those allegations alleged to be on information and belief, and as to those he believes it true.

(S'g'd) J. S. LOW.

Subscribed and sworn to before me this 27th day of July, A. D. 1904.

(S'g'd)
[SEAL.] WILLIAM SAVIDGE,
Notary Public, First Judicial Circuit.

23

EXHIBIT B.

Before a Judge of the Circuit Court of the First Circuit, Territory of Hawaii.

In the Matter of the Guardianship of ANNIE T. K. PARKER, a Minor.

Decision on Objection to Jurisdiction.

In the demurrer of Alfred W. Carter to the amended petition of Annie T. K. Parker by her next friend, it was claimed that the circuit judge had no jurisdiction of this proceeding, and the decision over-ruling that demurrer mentioned the fact that a grave constitutional question seemed to be involved, which had not however been argued. The question which arose in the mind of the judge was as to whether the statute conferring judicial powers upon the judges at chambers was in conflict with sec. 81 of the organic act of this Territory which provides "that the judicial power of the Territory shall be vested in one supreme court, circuit courts and in such inferior courts as the legislature may from time to time establish," etc. Nowhere in the organic act is judicial power conferred upon the judges of courts named, and the question of jurisdiction of such judges to hear and determine a cause becomes therefore a question of gravest moment.

24 As the question of jurisdiction can be raised at any stage of a case and as the constitutionality of the statutes conferring upon the circuit judges judicial power was not determined upon the ruling upon the demurrer counsel for the guardian have raised it upon an objection to further proceedings in the case. The question then is now squarely presented to be passed upon as to whether or not such statutes are constitutional.

Counsel have cited many cases, among them being four cases which seem to be directly in point.

In a late case in Missouri, decided in 1901, it was held, *per syllabus*, "Under const. art. 6 sec. 1, vesting the judicial power of the State as to matters of law and equity in certain courts, excepting as the constitution itself otherwise provides, the legislature has no power

to authorize a circuit judge to hear and determine all the issues in a suit for a dissolution of a building and loan association in vacation, since such power can only be conferred upon a fully-organized court."

State *v.* Woodson, 161 Mo. 61 S. W. Rep. 252, the court saying,

"The power to try issues in a suit at law or in equity and pronounce judgment or decree upon the facts found or confessed can be conferred under our constitution, only on a fully organized court." *Id.*

In Michigan the supreme court held an assignment act unconstitutional as it gave a judge at chambers power which only a court should exercise, the court saying:

"By art. 6, sec. 1 of our constitution, the judicial power is vested in one supreme court, in circuit courts, in probate courts, and in justices of the peace * * * Section 2 of this act confers upon the judge in vacation the authority to hear and determine
25 summarily upon the questions of the insolvency of the debtor, his refusal etc. * * * A statute which confers such judicial power upon a circuit judge at chambers is clearly in conflict with art. VI sec. 1 of the constitution.

Risser *v.* Hoyt, 53 Mich. 185, 193–4, 18 N. W. Rep. 611.

In an earlier case the same court said:

"Under our constitution such powers as are strictly judicial in their character can only be vested in certain courts which are named in the constitution itself. The circuit courts,—as courts—have such powers. The judges, as judges, out of court, do not possess them, and cannot be vested with them."

Toledo etc. R. R. Co. *v.* Dunlap, 47 Mich. 462.

That "judicial power" is attempted to be conferred upon the circuit judges by our statutes is clear. They are given power "to hear and determine" and may render "judgments" and "decrees."

See Civ. Laws, sec. 1144, 1145, 1151.

In California, the supreme court held, per syllabi:

"The legislature cannot confer jurisdiction of special cases upon the county judge, nor can it confer such jurisdiction upon any tribunal or officer, except one of the courts mentioned in the sixth article of the constitution.

"The county judge is not the county court, and although the legislature may authorize the judges of courts, at chambers, to perform certain duties in respect to a cause, yet some court must have jurisdiction of the cause."

Spencer Creek Water Co. *v.* Vallejo, 48 Cal. 71, the court saying:

26 "It is our opinion that the legislature is not authorized to provide for the exercise of such jurisdiction by any tribunal other than one of the courts provided for by the constitution, and

that a statute which grants such jurisdiction to a judicial officer cannot be upheld. The opposite view is repugnant to the first section of art. VI (of the constitution) for that section declares that the judicial power of the State shall be vested in certain courts therein enumerated" etc. *Id.* pp. 73, 74.

Approved in Estate of Stevens, 83 Cal., 322.

From these citation- it will be readily seen that there is much force in the contention of counsel for the guardian, and that, notwithstanding the fact that for over four years circuit judges in these islands have heard and determined many cases, the claim of counsel that circuit judges cannot exercise such judicial power, is one that seems to be amply sustained by precedent. While it *seems* to me that counsel is right in his contention, yet the matter is one of such grave importance, affecting as it does, every judgment and decree rendered by every circuit judge in this Territory since the going into effect of the organic act, that with the limited time I have had to give the question I am loath to render any decision thereon.

In determining whether or not a statute is unconstitutional the rule is that a judge of the trial court shall not declare the statute unconstitutional unless he has no doubt of its unconstitutionality. As I cannot, with the limited time which it was possible to give to a consideration of this case, declare that I am *fully* satisfied that the statutes in question are in conflict with the organic act
27 although I am inclined to the opinion that they are, I shall therefore overrule the objection, and it is so ordered.

(Signed) GEAR, *J.*

(Endorsed and filed Sept. 2, 1904.)

(Endorsed and filed Sept. 7, 1904.)

28 *Summons.*

In the Supreme Court of the Territory of Hawaii.

($2. stamps.)

In re Application of A. W. CARTER, G'd'n of the Property of A. T. K. Parker, for a Writ of Prohibition against Hon. Geo. D. Gear, 2nd Judge, 1st Circuit Court, and J. S. Low, Next Friend of A. T. K. Parker.

The Territory of Hawaii to the high sheriff of the Territory, or his deputy; the sheriff of the island of Oahu or his deputy:

You are commanded to serve a copy of the petition and writ hereto attached upon the said Geo. D. Gear second judge of the

circuit court of the first circuit and J. S. Low next friend of Annie T. K. Parker a minor
to appear

to answer the annexed
of

And have you then there this writ with full return of your doings thereon.

Witness the honorable chief justice of the supreme court of the Territory of Hawaii, at Honolulu, island of Oahu, this 7th day of September, 1904.

[SEAL.] (S'g'd) GEORGE LUCAS, *Clerk.*

28½ *Return of Service.*

Served this summons as follows:

On Geo. D. Gear, second judge of the circuit court of the first circuit, and

On J. S. Low, next friend of Annie T. K. Parker, a minor at Honolulu, Oahu, this 8th day of September, A. D. 1904, by delivering to each of them a certified copy hereof and of the petition and writ annexed hereto, and at the same time showing each of them the original as directed.

Dated Sept. 8, 1904.

(S'g'd) ALBERT McGURN,
Deputy Sheriff.

29 In the Supreme Court of the Territory of Hawaii, October, 1904, Term. October, 1904, Session.

In the Matter of the Application of ALFRED W. CARTER, Guardian of the Property of Annie T. K. Parker, a Minor, for a Writ of Prohibition against the Honorable Geo. D. Gear, Second Judge of the Circuit Court of the First Judicial Circuit, at Chambers, and J. S. Low, Next Friend of Annie T. K. Parker, a Minor.

Answer of Geo. D. Gear, Second Judge of the Circuit Court of the First Circuit.

Now comes Geo. D. Gear, second judge of the circuit court of the first circuit, one of the respondents herein, and for answer to the petition for and writ of prohibition issued on the 7th day of September, 1904, and pleads and says:

First. That he admits the allegations contained in paragraphs one, two and four of said petition.

Second. That he denies that the amended motion and petition referred to in paragraph 3 of the petition herein was filed in any other

manner than it purports upon its face; and this respondent admits that he has taken cognizance and jurisdiction thereof, and has filed interlocutory decisions, and is about to proceed to a hearing of said cause on its merits, but denies that he has heard the same in any other manner than that regularly authorized by the statutes of the Territory of Hawaii, and the practice of the circuit courts of the Territory.

Third. That he denies the allegations contained in paragraph five of the petition herein, and alleges the truth to be that the said
30 amended motion and petition refer to and are predicated upon all the records in the matter of the guardianship of said Annie T. K. Parker, a minor, which proceeding was originally filed with the clerk of the circuit court of the first circuit, and is still pending in said circuit.

Fourth. That respondent admits the allegations contained in paragraph 6 of the petition herein, except that he does not admit that he acted only under the laws therein referred to, but alleges the facts to be that he has acted in said matter under and by virtue of all the laws of the Territory of Hawaii in the premises.

Fifth. That this respondent submits to the court as to what is the true construction of the laws, matters and things referred — in paragraphs 7–8–9 of the petition herein.

All of which matters and things this respondent prays may be inquired of by the court.

(S'g'd
GEO. D. GEAR,
2nd Judge Circuit Court of First Circuit.

Dated, Honolulu, October 1st, 1904.

(Endorsed and filed Oct. 3, 1904.)

31 In the Supreme Court of the Territory of Hawaii, October, 1904, Term. October, 1904, Session.

In the Matter of the Application of ALFRED W. CARTER, Guardian of the Property of Annie T. K. Parker, a Minor, for a Writ of Prohibition against the Honorable Geo. D. Gear, Second Judge of the Circuit Court of the First Judicial Circuit, at Chambers, and J. S. Low, Next Friend of Annie T. K. Parker, a Minor.

Answer of J. S. Low.

Now comes J. S. Low next friend of Annie T. K. Parker a minor one of the respondents herein and for answer to the petition for and writ of prohibition issued on the 7th day of September 1904, pleads and says:

That he submits to the judgment of the court herein.

Dated Honolulu, October 1st, 1904.

(S'g'd)
J. S. LOW,
Next Friend of Annie T. K. Parker, a Minor.

(Endorsed and filed Oct. 3, 1904.)

32 *Request for a Substitute Justice.*

In the Supreme Court of the Territory of Hawaii, October Term, 1904.

In re Application of A. W. CARTER, Guardian of Annie T. K. Parker, for a Writ of Prohibition.

To Hon. J. T. De Bolt:

Mr. Justice Hartwell being disqualified to sit with us in the above entitled cause, we, the remaining justices of the supreme court, hereby request and authorize you to sit with us and hear and determine the said cause.

Dated the 20th day of October 1904.

(S'g'd) W. F. FREAR.
(S'g'd) F. M. HATCH.

Attest:

(S'g'd) GEORGE LUCAS, *Clerk.*

(Endorsed and filed Oct. 20, 1904.)

33 Supreme Court of the Territory of Hawaii, October Term, 1904.

In the Matter of the Application of A. W. CARTER, Guardian of A. T. K. Parker, for a Writ of Prohibition.

HONOLULU, MONDAY, *October* 3, 1904.

Clerk's Minutes.

Motion to advance.

Before Frear, C. J., and Hatch, J.; Hartwell, J., disqualified.

Ballou and Marx appeared for the petitioner and Magoon and Lightfoot for the respondent.

Mr. Magoon reads motion to advance and argues.

Mr. Ballou argues.

The court grants the motion to advance and sets the case for hearing on Monday, Oct. 17, 1904.

Mr. Ballou presents a petition for leave to amend.

Mr. Magoon offers no objections.

The court allows the amendment.

34 Supreme Court of the Territory of Hawaii, October Term, 1904.

In the Matter of the Application of A. W. CARTER, Guardian of A. T. K. Parker, for a Writ of Prohibition.

HONOLULU, THURSDAY, *October 20th*, 1904.

Clerk's Minutes.

Petition for writ of prohibition.

Before Frear, C. J.; Hatch, J., and Judge De Bolt.

Kinney—McClanahan & Cooper, Robertson & Wilder and Ballou and Marx appeared for the petitioner and J. A. Magoon and J. Lightfoot for the respondent.

Counsel agree to submit both cases for writ of prohibition together.

Mr. Ballou argues.

At 12 m. a recess is taken till 2 p. m.

At 1.30 p. m. Mr. Ballou continues with his argument.

Mr. W. O. Smith argues.

Mr. Magoon argues.

At 4.30 p. m. the court adjourns for the day.

FRIDAY, *October 21st*, 1904.

Mr. Magoon continues with his argument.

Mr. Withington argues.

At 12 m. a recess is taken till 2 p. m.

At 2 p. m. Mr. Withington continues with his argument.

At 1.35 p. m. Mr. Warren argues.

35 At 3.10 p. m. Mr. Ballou replies.

At 4.5 p. m. the court adjourns until Monday October 24th.

36 In the Supreme Court of the Territory of Hawaii, October Term, 1904.

In the Matter of the Application of ALFRED W. CARTER, Guardian of the Property of Annie T. K. Parker, a Minor, for a Writ of Prohibition against the Honorable George D. Gear, Second Judge of the Circuit Court of the First Circuit, at Chambers, and J. S. Low, Next Friend of Annie T. K. Parker, a Minor.

Original.

Argued October 20–21, 1904; decided November 7, 1904.

Frear, C. J.; Hatch, J., and Circuit Judge De Bolt in place of Hartwell, J.

Circuit judges at chambers—independent jurisdiction in equity and probate matters; not impliedly repealed by organic act.—The equity and probate jurisdiction of circuit judges at chambers existing under the Hawaiian constitution, which vested the judicial power in one supreme court and such inferior courts as the legislature might establish, was not impliedly repealed by the provision of the organic act which vested such power in one supreme court, circuit courts, and such inferior courts as the legislature might establish. Although the powers of judges at chambers are usually limited to matters incidental or ancillary to causes pending in court,
37 judges at chambers, so-called, have in Hawaii not only such incidental powers but also independent jurisdiction in equity and probate matters. But such independent jurisdiction is exercised by such judges as courts of record, and not privately or summarily,—the phrase "circuit judge at chambers" being in such case merely a method of describing such courts.

Construction—rules of, applied.—In constructing a doubtful provision of an act, other provisions, the act as a whole, and its reason and spirit, may be considered; also the circumstances under which it was adopted, the history which preceded it, and the consequences of proposed constructions; weight may be given to long continued, unquestioned and contemporaneous construction; if the provision is borrowed, the construction placed upon it previously may be considered; repeals by implication are not favored; *expressio unius est exclusio alterius*.

38 Opinion of the court by FREAR, *C. J.*:

This is an application for a writ of prohibition to restrain further proceedings in a matter instituted by the respondent J. S. Low, as next friend of Annie T. K. Parker, a minor, before the respondent the second judge of the circuit court of the first circuit, at chambers,

for the removal of the petitioner as guardian of the property of the said Annie T. K. Parker. That matter was brought and is pending before the circuit judge at chambers under the provisions of sections 37 and 38 of chapter 57 of the Laws of 1892, commonly known as the judiciary act (C. L., sections 1145, 1146), as amended by sections 11 and 12 of act 32 of the Laws of 1903; and also sections 1343–1395 of the Civil Code of 1859, (Civil Laws, ch. 126), as amended by act 16 of the Laws of 1903,—these being the principal provisions that purport, among other things, to confer and to some extent define the jurisdiction of circuit judges at chambers in guardianship matters. The contention is that these provisions are void as being in conflict with section 81 of the organic act, which reads as follows:

"SEC. 81. That the judicial power of the Territory shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish. And until the legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the several courts and their jurisdiction and procedure shall continue in force except as herein otherwise provided."

It is argued that this section vests all the judicial power of the Territory in certain courts and that therefore none can be vested by Hawaiian laws, whether old or new, in circuit judges at chambers; that the powers of a judge at chambers are limited to matters incidental or ancillary to causes pending in court and do not extend to the hearing and determination of matters of a judicial nature
39 that are independent of any cause pending in court. A number of cases are cited in support of this view, particularly Ballard *v.* Carr, 48 Cal. 70; Risser *v.* Hoyt, 53 Mich. 185; Toledo A. A. & G. T. Ry. *v.* Dunlap, 47 Mich. 456; Rowe *v.* Rowe, 28 Mich. 353; P. Ft. W. & C. K. W. Co. *v.* Hurd, 17 Oh. St. 144; State *v.* Woodson, 161 Mo. 444; McKnight *v.* James, 155 U. S. 685. These cases differ to a greater or less extent from the present case in the language of the constitutional and statutory provisions involved and the circumstances under which those provisions were adopted as well as under which those cases arose, and there are other cases that tend the other way; and yet the cases cited contain reasoning of great force in support of the petitioner's contention.

The present case, however, can not be decided solely as if there were a definite constitutional or organic provision intended to control the organization of a judicial system in the future where none existed previously, or to be chiefly declarative of a different system previously existing, or to introduce radical changes in a previously existing system. No doubt the organic act may be regarded as in the nature of a constitution from the standpoint of the Territory, and Hawaiian laws relating to the judiciary, whether previously existing or subsequently enacted, cannot stand if in conflict with the provisions of that act (see 23 Ops. 539); and the circuit courts mentioned in section 81 of that act may, perhaps, be regarded, from the territorial standpoint, as constitutional courts. See Hind *v.* Wilder's S. Co., 14 Haw. 222; *Ex parte* Smith, 14 Haw.

269. Yet even a constitutional provision must be construed in connection with other provisions of the instrument, and also in the light of the circumstances under which it was adopted and the history which preceded it, and the natural consequences
40 of a proposed construction,—with a view to ascertaining the intention of its framers. This rule is especially applicable in the case of an act which, as in the case of the organic act now in question (a legislative act from the standpoint of the body that enacted it), contains many different provisions bearing upon the same subjects; which was enacted with reference to a highly developed system of government already existing; and which manifests upon its face from beginning to end an intention to continue that system except as changed in certain respects by that act. See particularly sections 1, 6–10, 64, 68, 71–79, 81, 83, 91. Many other sections which do not on their face show a general intent to continue the Hawaiian laws in force were themselves taken in whole or in part from the Hawaiian constitution of 1894, as, for examples, sections 11–54, 57–62, 80, 82, 84, 99. A striking illustration of the application of these rules of construction is found in the case of Hawaii *v.* Mankichi, 190 U. S. 197, in which the literal meaning of a provision of the joint resolution of annexation, which in a sense was the constitution of Hawaii for about two years, was held to be controlled by the general intent shown by the resolution as a whole, by the circumstances under which it was adopted, the past history of Hawaii and her judicial system, and the disastrous consequences that would result from a narrower construction. It is also a general rule of construction that when one State borrows a law from another State it also borrows the construction previously put upon it by the first State. Congress in the organic act not only adopted in general terms the laws of Hawaii, including those relative to the judiciary department, with certain exceptions (see 23 Ops. Att'y Gen'l, 539), but it borrowed the provisions of the organic act itself rela-
41 tive to the fundamentals of the judiciary mainly from the Hawaiian constitution of 1894, which were also in the Hawaiian constitutions of 1852, 1864 and 1887. Compare sections 81, 82 and 84 of the organic act with articles 82, 83 and 89 of the constitution of 1894. The division of jurisdiction between courts and judges at chambers, so-called, has existed, without its validity being questioned, under all of these constitutions.

This is a question of construction. It is not inherently impossible to confer independent jurisdiction of cases not requiring trial by jury upon judges at chambers. That may be done by constitutional provision or by statute in the absence of constitutional restriction. See Wilcox *v.* Wilcox, 14 N. Y. 577; Brewster *v.* Hartley, 37 Cal. 15; Stewart *v.* Daggy, 13 Neb. 290. Nor would it seem inappropriate where, as in Hawaii, the jurisdiction so conferred has as a rule been of an equitable as distinguished from a legal nature—such as was formerly exercised in England by the equity, ecclesiastical and admiralty courts—and has been exercised with the

formality and publicity usually obtaining in courts of law. The words "at chambers," indeed, may be used, and have been used here, in various senses. They may mean the judge's lodgings or private rooms or they may mean a room set apart, like an ordinary court room, for hearing matters without a jury. See Com. *v.* McLaughlin, 122 Mass. 449. Likewise, proceedings at chambers may imply a certain decree of informality; they may be more or less summary and before a judge acting privately without a clerk; or, they may be formal, instituted by petition and process, with service of summons as in cases before courts of law, and heard in a public court room by the judge with clerk, bailiff, and all the elements that are usually supposed to make up a court of record. Even the word "court" is subject
42 to more or less confusion. It is sometimes used to denote all that makes up the court, and sometimes to denote merely the presiding judge of the court. Again, in order to be a court, a body need not have a particular name. It may be designated a "circuit court" or it may simply be called a court with jurisdiction to hear and determine certain classes of cases. "District courts" and "district magistrates" are used interchangeably in our statutes to denote the same court. It is a court, though not of record. Commissioners of private ways and water rights under our statutes hold courts without names. A court is a political being. It is incorporeal. It may be described or designated in various ways—even without the use of the word "court" at all.

The words "court" and "chambers" have been used in various senses in Hawaii for more than half a century, but with recognized meanings, whether in statutes or judicial decisions, according to the circumstances. Powers at chambers of the incidental or ancillary sort have been conferred, but the words "at chambers" and other words deemed equivalent have also been used to signify certain distinctions in independent matters. The superior courts of record have borne different names from time to time, but superior jurisdiction has always been divided between the courts under their respective names and the judges of such courts at chambers. This has been a convenient way of indicating certain distinctions. The distinction is in general that between law and equity. The court under its proper name, as, for instance, the "circuit court," sits at regular terms, with a jury, in law cases, which go to a higher court by bill of exceptions. The "circuit judge at chambers," or the "circuit judge," the "judge of a court of record at chambers," the "circuit court at chambers," the "probate court," the
43 "probate judge at chambers," etc., as he is variously called, sits continuously, without a jury, in equity and probate, and formerly in admiralty and bankruptcy cases, which go to a higher court by general appeal. There is a court, without a proper name, of the circuit judge at chambers. It has often been referred to in both the statutes and judicial decisions as the court of equity or the court of probate, etc. Moreover, it is a court of record,

with clerk, bailiff, etc. It usually sits in the public court room of the circuit court. It sometimes sits in the judge's room or chambers adjoining, as a matter of convenience. The court also, as distinguished from the judge or the judge at chambers, has sat in the judge's chambers in matters not requiring a jury, or jury waived, or even with a jury, as a matter of convenience or necessity, though naturally not often, at least with a jury, for it is not convenient to have a jury in chambers. For the last twelve years cases could be brought to this court by writ of error as well as by appeal from circuit judges at chambers just as they may be brought by writ of error as well as by exceptions from circuit courts, and that is still the case.

The jurisdiction and procedure of the courts and the judges at chambers is not all defined by statute. Much of it is covered by statute only in a very general way. For instance, judges at chambers are given jurisdiction in equity in general terms—which means that they have such equitable jurisdiction as has been exercised in chancery in England and the equity courts in America. Even the act of 1878, which enumerates many subjects of equity jurisdiction is not exclusive, although it was taken from the Massachusetts statute, which is there held exclusive. See Dole *v.* Gear, 14 Haw. 560. Similarly as to guardianship matters. See Hoare *v.* Allen, 13 Haw. 262.

44 Much, as to jurisdiction and procedure, is governed by what may be considered Hawaiian common law,—that has grown up without the aid of statute or has been built upon statutes by inference and been recognized by bench and bar and has to some extent been assumed in the enactment of statutes. In fact, the judiciary has developed here, especially in its earlier period, much as it did in early English history, gradually and largely without the aid of statute. There was a gradual separation of judicial from executive and legislative functions, a gradual organization of a judicial system, introduction of trial by jury, separation of law and equity, separation of civil and criminal matters at law, and of equity, probate and admiralty matters at chambers, and of the functions of the judge and the jury, and a gradual development in forms of pleading and practice. This began long before the first constitution, that of 1840, the provisions of which were somewhat crude and meager and but little suggestive of the system, especially so far as the superior courts of record—the governors' courts—were concerned, that then existed and rapidly developed for some years afterwards. Prior to the constitution of 1840, there were scarcely any statutory provisions relative to the judiciary. After that until the act of 1847, organizing the judiciary, there was little more than the act of 1842 (Blue Book, p. 170), which related chiefly to juries and began: "There are two distinct kinds of courts. One kind where the judges or tax officers decide the case by themselves, and the other kind where they can not act by themselves, but certain other persons must be associated with them. These persons who are associated with them shall constitute the jury." The first comprehensive act

covering the judicial system with any degree of completeness was that of 1847. That is largely the basis, directly or indirectly, of all subsequent comprehensive acts relative to the judiciary. It divided jurisdiction between certain named courts and judges at chambers. Then came the constitution of 1852, which has been the basis of all subsequent constitutions. It provided in article 81: "The judicial power of the kingdom shall be vested in one supreme court, and in such inferior courts as the legislature may from time to time establish." This was followed the next year by the second comprehensive judiciary act, drafted, we believe, by the same person who drafted the constitution, Chief Justice Lee. The main object of this act was to conform the laws to the change in the supreme court. The former supreme court, consisting of the king, premier, and four chiefs, whose functions had practically ceased, was dropped altogether, and what had previously been the superior court of law and equity in name, but had already become practically the supreme court as well in reality, was made such in name also. This act also preserves the distinction between the courts and the judges at chambers, in matters of jurisdiction, procedure, methods of appeal, etc. Next came the Civil Code of 1859, embodying, in sections 815–1282, a codification of the laws relating to the judiciary, namely, the acts of 1847 and 1852, and a number of subsequent acts of minor importance, but preserving the distinction between the courts and the judges at chambers in language for the most part still in force in the statute books. The constitution of 1864 followed, copying for the most part the provisions of that of 1852, including the provision now in question, which was article 64 of that constitution. The constitution of 1887 was copied mostly from that of 1864, and contains the same article 64. Meanwhile a number of more or less important acts were passed more fully defining or altering in detail the jurisdiction and procedure, that already for the most part existed, in regard to particular subjects. These are set forth in the compilations of 1884 and 1897, which were not enacted. The judiciary act of 1892 made some important changes in the organization of the judiciary and the jurisdiction of the courts but preserved the same distinction between the courts and the judges at chambers. The constitution of 1894 copied the provisions of that of 1864 relating to the judiciary with some changes not material to the questions now under consideration. The provision now particularly in question appears as article 82. In view of the fact that constitution after constitution and statute after statute has been adopted by constitutional conventions and legislatures and accepted without question by bench and bar and the public throughout the sixty-four years of organized constitutional government in Hawaii, recognizing the constitutionality and propriety of provisions such as those now called in question, coupled with the fact that the "judges at chambers" in the exercise of jurisdiction in equity and probate matters are and have been regarded as courts,

and not only that, but courts of record, it would be preposterous to hold that the statutes conferring or defining such jurisdiction of judges at chambers would be void under Hawaiian constitutions or immediately prior to the enactment of the organic act.

Under the constitutions of Hawaii, the courts of the circuit judges at chambers as well as the circuit courts, have been established by the legislatures as inferior courts, that is, inferior to the supreme court, in the exercise of the power to establish such courts under the constitutional provision in question. What the relation between a circuit court and the court of a circuit judge at chambers is, is an interesting question that was much argued in this case but need not be decided. In some jurisdictions law and equity are ad-
47 ministered by distinct courts as well as by distinct forms of procedure; in others by the same courts though by distinct forms of procedure: in still others by the same court through the same forms of procedure. Whether the circuit court and the court of the circuit judge at chambers should be regarded as one, that is, whether they should be considered merely as the law and equity sides of the same court, or whether they should be considered as distinct courts, though presided over by the same judges, is a question upon each side of which much can be said. Many statutory provisions as well as many decisions may be regarded as pointing in each direction and yet are not necessarily inconsistent with either theory. Among the cases see Kendall *v.* Holloway, 16 Haw. 45; Kala *v.* Mills, 15 Haw. 422; Hind *v.* Wilder's S. Co., 14 Haw. 215; 223; Silva *v.* Souza, 14 Haw. 46; Willard *v.* Vincent, 13 Haw. 237; Kona Coffe Co. *v.* Circuit Court, 10 Haw. 571; Est. of Metcalf, 3 Haw. 614. A discussion of the numerous statutes and decisions would be too lengthy. Whether the court of the judge at chambers is the same as the circuit court or a different court, it is a court, and it is a court of record, and it and its predecessors have existed unquestioned for more than fifty years.

The question is not merely whether Congress intended by section 81 of the organic act to prohibit the creation of such a court in the future but whether it intended to abrogate such courts already existing. That section is borrowed with modifications from the provision above quoted found in the last four Hawaiian constitutions, under which such courts must be held, under the rule of long continued and unquestioned as well as contemporary construction, not to mention other rules, to have been legally constituted. If no modifications had been made in this borrowed section, could we hesitate to hold that Congress did not intend that it should mean something so radically different from what it has been construed for half a
48 century to mean, or that Congress did not intend by adopting the same provision to repeal by implication what had become so thoroughly established under it? Do the modifications require a different construction? The only modification in the main provision of this section consists in the insertion of the words "circuit courts." It is contended that this modification in itself shows an

intention to introduce a change in the judicial system of Hawaii. That is not a necessary inference. If we could with propriety look to the reports in the Congressional Record of the reasons given for inserting these words by way of amendment on the floor of Congress, we should find it to be an erroneous inference. The insertion of these words would naturally, in view of the fact that there were already circuit courts here, be considered as preservative rather than destructive. Those words, of course, mean such circuit courts as were already here. Otherwise there would be nothing to indicate what their nature was to be, except that they should be "circuit" courts—which gives no clue to their jurisdiction as respects either subject matter or territory. The continuation of Hawaiian laws relative to the judiciary also shows that the existing circuit courts were meant. Congress did not define the jurisdiction of such courts except by reference to the laws of Hawaii. The apparent object of inserting the words "circuit courts" was to insure a continuance of those courts rather than the abrogation of other courts, and the reason why it was thought best to insert these words for that purpose may have been the possibility of doubt as to whether such courts, being courts of record of general jurisdiction, would be included under the words "inferior courts." Several reasons may easily be imagined as likely to suggest the advisability of inserting these words. In the nature of things there might be courts of
49 circuit judges at chambers consistently with the presence of the words "circuit courts" in this provision, as well as there could be courts of judges at chambers under the original provision in the Hawaiian constitution, when there were courts of the justices of the supreme court at chambers, during the period when they had original as well as appellate jurisdiction, notwithstanding the words "supreme *court*" in the constitutional provision, or when there were courts of circuit judges at chambers notwithstanding the words "inferior *courts*." Indeed, if we must infer an intention to make radical changes by the introduction of these words, we may as well infer that Congress meant "circuit" courts strictly speaking, that is, courts that travel about the circuit, and so to abrogate the existing circuit courts which had become fixed although they retained the name that they had years ago when they did travel.

But it is contended that the remainder of the section shows that a change was intended. This, to repeat it, reads as follows: "And until the legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the several courts and their jurisdiction and procedure shall continue in force except as herein otherwise provided." The argument is that "herein" refers to this section and not to the entire act, and that, since the insertion of the words "circuit courts" is the only change made, the phrase "*except* as herein *otherwise* provided" must show that a change was intended in the classes of courts. It is clear, however, that "herein" refers to the entire act, and therefore, since a number of changes in the judiciary are made by other sections (*e. g.*, secs. 7, 83, 86), the phrase

in question is fully explained by reference to them. "Herein" may refer to the act as well as to the section. It must be held to
50 refer to the act or else this section would be in conflict with the other sections that make changes in the laws relative to the judiciary. Moreover, the same phrase "except as herein otherwise provided" is found in other sections where it must refer to the whole act. See secs. 5, 12, 35, 48.

The latter portion of section 81, indeed, far from showing an intention to repeal, shows a general intention to continue in force the laws "heretofore in force concerning the several courts and their jurisdiction and procedure." But it is suggested that the laws conferring jurisdiction on judges at chambers were void under the Hawaiian constitutions also, and so were not "heretofore in force." This argument has already been practically disposed of. It is further argued that even if the old laws were continued in force, this would not affect the argument that the new laws, namely, the amendments of 1903, above referred to, were void. But (aside from the more reasonable view that future amendments might well be made as to details along lines consistent in principle with the old laws, and the fact that the amendments in question did not affect the old laws materially so far as the questions now before us are concerned), even if the new laws were void, the old laws would remain in force and they cover the ground. It is contended, however, on the other hand, that the old laws were to continue only "until the legislature shall otherwise provide," and that, since the legislature has otherwise provided, namely, in the amendments referred to, the old laws have ceased to be operative. But, as we have seen, the legislature has not otherwise provided except in certain particulars—which do not go to the extent of materially affecting the general jurisdiction of circuit judges in guardianship matters. Moreover, if the new laws are valid, they are sufficient
51 in themselves without the old laws; while, if they are invalid, the legislature has not otherwise provided and the old laws remain and are sufficient in themselves.

Thus, not only is there nothing in section 81 that requires us to hold that Congress intended, by the insertion of the words "circuit courts," to effect the important change contended for—a change by mere vague implication that would abrogate in toto the courts having equity and probate jurisdiction, but there is much in this section to indicate the contrary. This different intention is strongly sustained by other sections of the act. Section 83, for instance, shows a general intent in this direction by providing "that the laws of Hawaii relative to the judiciary department, including civil and criminal procedure, except as amended by this act, are continued in force," etc., and then making certain specific changes, but not in respect to the jurisdiction or powers of judges at chambers. Section 7 expressly repeals many laws relating to the judiciary, such as that conferring upon circuit judges jurisdiction in bankruptcy. It even expressly repeals the "first subdivision of section eleven hun-

dred and forty-five," (relating to admiralty jurisdiction) of the Civil Laws,—the section that is now in question and that defines in twelve subdivisions the jurisdiction of circuit judges at chambers, but does not mention the subdivisions that confer upon such judges equity and probate jurisdiction. *Expressio unius est exclusio alterius. Expressum facit cessare tacitum.* Section 10, entitled "Construction of existing statutes," provides "that all rights of action, suits at law and in equity, prosecutions, and judgments existing prior to the taking effect if this act shall continue to be as effectual as if this act had not been passed; * * * all actions at law, *suits in equity,*
52 *and other proceedings* then pending in the courts of the Republic of Hawaii shall be carried on to final judgment and execution in the *corresponding courts* of the Territory of Hawaii." This permitted the retention by circuit judges at chambers of admiralty cases then pending, although all admiralty jurisdiction over new cases was transferred from them to the United States district court of Hawaii. *Ex p.* Wilder's S. Co., 183 U. S. 545; Wilder's S. Co., *v.* Hind, 108 Fed. 113; Hind *v.* Wilder's S. Co., 13 Haw. 174. It equally authorized the retention by circuit judges at chambers of jurisdiction in equity and probate matters then pending. Some such matters, especially in probate, might not be finally disposed of for several years, during all of which time the circuit judges at chambers would continue to exercise such jurisdiction. This, it is true, is in the nature of an interregnum clause. But it provides for the continuation of such suits and proceedings in the *corresponding* courts of the Territory, thus implying that there were to be such corresponding courts. It was a temporary provision for pending cases, not temporary for existing courts; it provided for the completion of all pending cases, whether of kinds the jurisdiction over which was to remain or be taken away—but in the corresponding courts, which were to continue for new as well as for pending cases. It was not contemplated that such cases should be transferred from circuit judges at chambers to circuit courts; nor is there any indication of an intention to continue the courts of the circuit judges at chambers temporarily only.

The permanent writ is denied and the temporary writ dissolved.

(S'g'd) W. F. FREAR.
(S'g'd) F. M. HATCH.
(S'g'd) J. T. DE BOLT.

Ballou & Marx; Kinney, McClanahan & Cooper; and Robertson & Wilder for petitioner.

J. A. Magoon and J. Lightfoot for respondents.

(Endorsed and filed Nov. 7, 1904.)

53 In the Supreme Court of the Territory of Hawaii.

In the Matter of the Application of ALFRED W. CARTER, Guardian of the Property of Annie T. K. Parker, a Minor, for a Writ of Prohibition against the Honorable Geo. D. Gear, Second Judge of the Circuit Court of the First Circuit, at Chambers, and J. S. Low, Next Friend of Annie T. K. Parker, a Minor.

Decree.

The above entitled matter having duly come on for hearing before the full court, Messrs. Ballou and Marx appearing for petitioner, and J. Alfred Magoon-J. Lightfoot for respondents, upon full consideration by the court, and in pursuance of the decision this day filed, the petition for permanent writ of prohibition is hereby denied, and the temporary writ heretofore issued herein is hereby dissolved.

Dated Honolulu, November 7th, 1904.

By the court:

(S'g'd) GEORGE LUCAS, *Clerk.*

Approved as to form

(S'g'd) BALLOU & MARX.

(Endorsed and filed Nov. 7, 1904)

54 In the Supreme Court of the Territory of Hawaii, October Term, 1904.

In the Matter of the Application of ALFRED W. CARTER, Guardian of the Property of Annie T. K. Parker, a Minor, for a Writ of Prohibition against the Honorable George D. Gear, Second Judge of the Circuit Court of the First Circuit, at Chambers, and John S. Low, Next friend of Annie T. K. Parker, a Minor. Writ of Prohibition.

Petition for Leave to Amend.

Now comes Alfred W. Carter, guardian of the property of Annie T. K. Parker, a minor, and moves for leave to amend his petition for a writ of prohibition on file herein by inserting between paragraphs 9 and 10 of said petition the following paragraph, to-wit:

"9*a*. That the circuit court of the first judicial circuit, Territory of Hawaii, has no jurisdiction over the subject matter of said amended motion and petition, nor over any of the matters and things therein alleged, nor over the estate of Annie T. K. Parker, a minor, nor any matter in connection therewith."

ALFRED W. CARTER, *Guardian,*

By his attorneys,

(S'g'd) BALLOU & MARX.

To J. A. Magoon and J. Lightfoot, attorneys for respondents:

Please take notice we shall ask to be heard on the above motion before the supreme court of the Territory of Hawaii on the — day of October, A. D. 1904, or as soon thereafter as counsel can be heard.

Honolulu, October 3rd, A. D. 1904.

(S'g'd) BALLOU & MARX,
Attorneys for Petitioner.

55 In the Supreme Court of the Territory of Hawaii, October Term, 1904.

In the Matter of the Application of ALFRED W. CARTER, Guardian of the Property of Annie T. K. Parker, a Minor, for a Writ of Prohibition against the Honorable George D. Gear, Second Judge of the Circuit Court of the First Circuit, at Chambers, and John S. Low, Next Friend of Annie T. K. Parker, a Minor. Writ of Prohibition.

Order Allowing Amendment.

Upon motion by the petitioner herein for leave to amend his petition for a writ of prohibition by inserting between paragraphs 9 and 10 of said petition the following paragraph, to-wit:

"*9a.* That the circuit court of the first judicial circuit Territory of Hawaii, has no jurisdiction over the subject matter of said amended motion and petition, nor over any of the matters and things therein alleged, nor over the estate of Annie T. K. Parker, a minor, nor any matter in connection therewith."

It is hereby ordered, adjudged and decreed that said amendment be and the same is hereby allowed, and the clerk is hereby ordered to note the same upon the face of the original petition for a writ of prohibition on file herein.

(S'g'd) GEORGE LUCAS, *Clerk.*

(Endorsed and filed Oct. 3, 1904.)

56 In the Supreme Court of the Territory of Hawaii, October, 1904, Term. October, 1904, Session.

In the Matter of the Application of ALFRED W. CARTER, Guardian of the Property of Annie T. K. Parker, a Minor, for a Writ of Prohibition against the Honorable Geo. D. Gear, Second Judge of the Circuit Court of the First Judicial Circuit, at Chambers, and J. S. Low, Next Friend of Annie T. K. Parker, a Minor.

Motion to Advance Cause on Calendar.

Now comes J. S. Low, next friend of Annie T. K. Parker, a minor, one of the respondents above named, by his attorneys, J. Alfred

Magoon- J. Lightfoot, and moves this honorable court that the writ of prohibition, heretofore, to-wit, on the 7th day of September, 1904, issued out of said court, be advanced on the calendar so that the same may be heard at an early date of the present session, and bases this motion upon the affidavit of J. Alfred Magoon, hereto attached and made a part hereof, and to which reference is hereby made, and upon the records in said cause.

Dated Honolulu, Sept. 27th, 1904.

(S'g'd) J. ALFRED MAGOON,
J. LIGHTFOOT,
Attorneys for Movant.

To Alfred W. Carter, guardian of the property of Annie T. K Parker, a minor, and to Messrs. Ballou and Marx, his attorneys

You and each of you please take notice that the foregoing motion to advance cause on the calendar will be presented before the honorable supreme court of the Territory of Hawaii, in the supreme court room, Judiciary building, Honolulu, island of Oahu, Territory of Hawaii, on Monday next the 3rd day of October, A. D. 1904, at ten o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard.

Dated Honolulu, Sept. 27th, A. D. 1904.

(S'g'd) J. ALFRED MAGOON,
J. LIGHTFOOT,
Attorneys for Movant.

57 In the Supreme Court of the Territory of Hawaii, October, 1904, Term. October, 1904, Session.

In the Matter of the Application of ALFRED W. CARTER, Guardian of the Property of Annie T. K. Parker, a Minor, for a Writ of Prohibition against the Honorable Geo. D. Gear, Second Judge of the Circuit Court of the First Judicial Circuit, at Chambers, and J. S. Low, Next Friend of Annie T. K. Parker, a Minor.

Affidavit of J. Alfred Magoon.

CITY OF HONOLULU, } ss:
Island of Oahu, Territory of Hawaii, }

Now comes J. Alfred Magoon and being first duly sworn on oath deposes and says that he — attorney of record for J. S. Low next friend of Annie T. K. Parker, a minor, one of the respondents above named. That the proceedings stayed by the writ of prohibition, heretofore, to-wit, on the 7th day of September, 1904, issued out of the honorable supreme court of the Territory of Hawaii, directed to the Honorable Geo. D. Gear, second judge of the circuit court of the

first judicial circuit, Territory of Hawaii, and to J. S. Low, next friend of Annie T. K. Parker, a minor, were commenced by motion of said J. S. Low, next friend as aforesaid, filed in the circuit court of the first judicial circuit, Territory of Hawaii, for the removal of A. W. Carter as guardian of said minor.

That after the filing of said motion various proceedings were had thereon before the said judge, sitting at chambers in probate, and that the matters involved in said motion, and the amendments thereto are now at issue.

58 That said writ of prohibition brings into question the construction of an act entitled "An act to provide a government for the Territory of Hawaii," passed by the Fifty-sixth Congress of the United States of America on the 27th day of April, and approved on the 30th day of April, A. D. 1900, and the constitutionality of acts 16 and 32 of the legislature of the Territory of Hawaii, at the 1903 session thereof.

That said writ of prohibition not only brings into question the jurisdiction of the said judge, sitting at chambers in probate, of the proceedings for the removal of said A. W. Carter as guardian as aforesaid, but the decision of this honorable court will affect the validity of all proceedings in equity and probate, and proceedings for divorce had in chambers since the 27th day of April, 1900, and will involve the validity of every order, judgment and decree made by every circuit judge sitting in chambers since the last above mentioned date.

That the administration of justice in the Territory of Hawaii is now crippled and impaired pending a decision by this honorable court of the questions raised by said writ of prohibition, and that, in the opinion of affiant, public necessity urgently demands a speedy determination of said question.

Dated Honolulu, September 27th, 1904.

(S'g'd) J. ALFRED MAGOON.

Subscribed and sworn to before me this 27th day of September, 1904.

[SEAL.] (S'g'd) F. W. WUNDENBERG,
Notary Public, 1st Circuit.

(Endorsed and filed Sept. 27, 1904.)

59 In the Supreme Court of the Territory of Hawaii, October Term, 1904.

In the Matter of the Application of ALFRED W. CARTER, Guardian of the Property of Annie T. K. Parker, a Minor, for a Writ of Prohibition against the Honorable George D. Gear, Second Judge of the Circuit Court of the First Circuit, at Chambers, and John S. Low, Next Friend of Annie T. K. Parker, a Minor. Prohibition.

Petition for Writ of Error from the Supreme Court of the United States.

To the Honorable Walter F. Frear, chief justice of the supreme court of the Territory of Hawaii:

Now comes Alfred W. Carter, guardian of the property of Annie T. K. Parker, a minor, the above named petitioner, by his attorneys, Sidney M. Ballou, W. A. Kinney, Henry E. Cooper, A. G. M. Robertson, A. A. Wilder and Benjamin L. Marx, and complains and alleges that he is a citizen of the United States of America; that in the above entitled matter on the 7th day of November, A. D. 1904, a final judgment or decree was rendered against your petitioner by the supreme court of the Territory of Hawaii, that being the highest court of law or equity of the said Territory of Hawaii in which a decision in said suit could be had, wherein it was adjudged that the laws of the Territory of Hawaii conferring judicial power not incidental or ancillary to a cause pending in some court, upon circuit judges at chambers, and particularly sections 37 and 38 of chapter 57 of the Session Laws of the Territory of Hawaii for 1892, sections 1343 to 1395 of the Civil Code of 1859, act 16 of the Session
60 Laws of the Territory of Hawaii for 1903 and section 11 of act 32 of the Session Laws of the Territory of Hawaii for 1903 are not in conflict with section 81 of an act of Congress entitled "An act to provide a government for the Territory of Hawaii," approved April 30th, 1900, and also adjudged that the writ of prohibition therein prayed for should be denied, and the temporary writ heretofore issued should be dissolved, all of which will more fully in detail appear from the assignment of errors filed with this petition, whereby manifest errors were committed to the great prejudice and damage of your petitioner.

Wherefore your petitioner prays for the allowance of a writ of error from the Supreme Court of the United States to the supreme court of the Territory of Hawaii and the judges thereof to the end that the record in the said cause may be removed into the Supreme Court of the United States, and the errors complained of by your petitioner may be examined and corrected, and said judgment reversed, and for the approval of the bond presented herewith as a supersedeas bond.

And your petitioner will ever pray.
Dated, Honolulu, November 8th, 1904.

ALFRED W. CARTER,
Guardian of the Property of Annie T. K. Parker, a Minor,
By his attorneys:

(S'g'd) SIDNEY M. BALLOU,
(S'g'd) WM. A. KINNEY,
(S'g'd) HENRY E. COOPER,
(S'g'd) A. G. M. ROBERTSON,
(S'g'd) A. A. WILDER,
(S'g'd) BENJAMIN L. MARX.

61 In the Supreme Court of the Territory of Hawaii, October Term, 1904.

ALFRED W. CARTER, Guardian of the Property of Annie T. K. Parker, a Minor, Plaintiff in Error,
vs.
Honorable GEORGE D. GEAR, Second Judge of the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers, and John S. Low, Next Friend of Annie T. K. Parker, a Minor, Defendants in Error.
} Writ of Error.

Order Allowing Writ of Error from the Supreme Court of the United States.

The above entitled matter coming on to be heard upon the petition of the petitioner therein for a writ of error from the Supreme Court of the United States to the supreme court of the Territory of Hawaii, and upon examination of said petition and the record in said matter, and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter:

It is ordered that a writ of error be and is hereby allowed to this court from the Supreme Court of the United States, the writ of error to operate as a supersedeas, and that the bond for that purpose presented by said petitioner in the sum of $1000. be and the same is hereby approved.

Honolulu, T. H., November 8, 1904.
(S'g'd)
W. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

(Endorsed:) Supreme court—Territory of Hawaii. Alfred W. Carter guardian etc.—plaintiff in error *vs.* Hon. Geo. D. Gear second judge etc. & John S. Low, next friend etc.—defendants in error. Petition for writ of error and order allowing writ—Filed November 8, 1904—Henry Smith, clerk.—Ballou & Marx—303 Stangenwald bldg.—Honolulu—attorneys for plaintiff in error.

62 In the Supreme Court of the United States.

ALFRED W. CARTER, Guardian of the Property of Annie T. K. Parker, a Minor, Plaintiff in Error,
vs.
Honorable GEORGE D. GEAR, Second Judge of the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers, and John S. Low, Next Friend of Annie T. K. Parker, a Minor, Defendants in Error.
} Writ of Error.

UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the honorable judges of the supreme court of the Territory of Hawaii, Greeting:

Because in the record and proceedings, as also in the rendition of a final judgment or decree which is in the said supreme court of the Territory of Hawaii, before you, or some of you, being the highest court of law or equity of the said Territory in which a decision could be had in the suit entitled "In the matter of the application of Alfred W. Carter, guardian of the property of Annie T. K. Parker, a minor, for a writ of prohibition against the Honorable George D. Gear, second judge of the circuit court of the first circuit, at chambers, and John S. Low, next friend of Annie T. K. Parker, a minor," where was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States and the decision was against their validity, or where was drawn in question the validity of a statute of or an authority exercised under said Territory of Hawaii, on the ground of their being repugnant to the Constitution, treaties or laws of the United States and the decision was in favor of their validity, or where any title, right, privilege or immunity was claimed under the Constitution or any treaty or statute of or commission held or authority exercised under the United States, and the decision was against
63 the title, right, privilege or immunity specially set up or claimed by either parties under said Constitution, treaty, statute, commission or authority, a manifest error hath happened to the great damage of the said Alfred W. Carter, guardian of the property of Annie T. K. Parker, a minor, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof in the said Supreme Court, to be then and there held, that

the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller Chief Justice of the Supreme Court, the 8th day of November in the year of our Lord one thousand nine hundred and four.

[SEAL.] (S'g'd) HENRY SMITH,
Clerk of the Supreme Court, of the Territory of Hawaii.

(Endorsed:) In the United States Supreme Court.—Alfred W. Carter guardian etc., plaintiff in error *vs.* Hon. Geo. D. Gear, second judge etc. and John S. Low, next friend etc. defendants in error.—Writ of error.—Filed November 8, 1904.—Henry Smith, clerk. Ballou & Marx—303 Stangenwald bldg. Honolulu.—attorneys for plaintiff in error.

Allowed by
(S'g'd) W. F. FREAR,
Chief Justice Supreme Court Territory of Hawaii.

64 In the Supreme Court of the Territory of Hawaii.

ALFRED W. CARTER, Guardian of the Property of Annie T. K. Parker, a Minor, Plaintiff in Error,
vs.
Honorable GEORGE D. GEAR, Second Judge of the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers, and John S. Low, Next Friend of Annie T. K. Parker, a Minor, Defendants in Error. } Writ of Error.

Assignment of Errors.

Now comes Alfred W. Carter, guardian of the property of Annie T. K. Parker, a minor, plaintiff in error in the above entitled cause, and respectfully submits:

That in the record, proceedings, decision and final judgment of the supreme court of the Territory of Hawaii in the cause entitled "In the matter of the application of Alfred W. Carter, guardian of the property of Annie T. K. Parker, a minor, for a writ of prohibition against the Honorable George D. Gear, second judge of the circuit court of the first circuit at chambers, and John S. Low, next friend of Annie T. K. Parker, a minor," there is manifest error in this, to-wit:

First. That the court erred in holding that the statutes of the Territory of Hawaii purporting to confer upon the judges of the several circuit courts, at chambers, within their respective jurisdic-

tions, judicial power not incident or ancillary to some cause pending before a court are not in conflict with and in violation of the provisions of section 81 of an act of Congress entitled "An act to provide a government for the Territory of Hawaii," approved
65 April 30th, 1900, and commonly known as "the organic act of the Territory of Hawaii."

Second. That the court erred in holding that the statutes of the Territory of Hawaii purporting to confer upon the judges of the several circuit courts, at chambers, within their respective jurisdictions, judicial power not incident or ancillary to some cause pending before a court were not repealed by said act of Congress entitled "An act to provide a government for the Territory of Hawaii," approved April 30th, 1900, and commonly known as "the organic act of the Territory of Hawaii.";

Third. That the court erred in holding that the provisions of sections 37 and 38 of chapter 57 of the Session Laws of the Territory of Hawaii for 1892; sections 1343 to 1395 of the Civil Code of 1859; act 16 of the Session Laws of the Territory of Hawaii for 1903; and sections 11 and 12 of act 32 of the Session Laws of the Territory of Hawaii for 1903, and each of said sections and acts are not in conflict with and in violation of the provisions of section 81 of an act of Congress entitled "An act to provide a government for the Territory of Hawaii," approved April 30th, 1900, and commonly known as "the organic act of the Territory of Hawaii,";

Fourth. That the court erred in holding that the Honorable George D. Gear, second judge of the circuit court of the first circuit, at chambers, had jurisdiction of the proceedings to remove Alfred W. Carter as guardian of the property of Annie T. K. Parker, a minor;

Fifth. That the court erred in ordering judgment to be entered and in entering judgment denying a permanent writ of prohibition and dissolving the temporary writ issued herein on the 7th day of September, A. D. 1904;

66 Wherefore and on account of said manifest errors and each of them, said Alfred W. Carter, guardian of the property of Annie T. K. Parker, a minor, prays that the judgment of the said supreme court of the Territory of Hawaii in said cause be reversed, and that said supreme court of the Territory of Hawaii be ordered to enter and order making the writ of prohibition heretofore issued in said cause perpetual.

Dated, Honolulu November 8th, 1904.

(S'g'd) SIDNEY M. BALLOU,
(S'g'd) WM. A. KINNEY,
(S'g'd) HENRY E. COOPER,
(S'g'd) A. G. M. ROBERTSON,
(S'g'd) A. A. WILDER,
(S'g'd) BENJAMIN L. MARX,
Attorneys for Plaintiff in Error.

(Endorsed:) Supreme court, Territory of Hawaii.—Alfred W. Carter, guardian, etc. plaintiff in error *vs.* Hon. Geo. D. Gear, second judge etc. and John S. Low, next friend etc.—defendants in error.—Assignment of errors.—Filed November 8, 1904.—Henry Smith, clerk.—Ballou & Marx—303 Stangenwald bldg. Honolulu—attorneys for plaintiff in error.

67 The Supreme Court of the United States.

($1. stamp.)

ALFRED W. CARTER, Guardian of the Property of Annie T. K. Parker, a Minor, Plaintiff in Error,
vs.
Honorable GEORGE D. GEAR, Second Judge of the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers, and John S. Low, Next Friend of Annie T. K. Parker, a Minor, Defendants in Error.
} Writ of Error

Bond on Writ of Error.

Know all men by these presents that I, Alfred W. Carter, guardian of the property of Annie T. K. Parker, a minor, as principal and the Pacific Surety Company, a corporation organized and existing under the laws of the State of California, as surety, are held and firmly bound unto the Honorable George D. Gear, second judge of the circuit court of the first circuit, Territory of Hawaii, at chambers, and John S. Low, next friend of Annie T. K. Parker, a minor, in the sum of one thousand dollars ($1,000.00), to be paid to the said obligees, their successors, representatives and assigns; to the payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

The condition of this obligation is such, that

Whereas the above named plaintiff in error has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment or decree rendered on the 7th day of November, 1904, by the supreme court of the Territory of Hawaii in an
68 action entitled: "In the matter of the application of Alfred W. Carter, guardian of the property of Annie T. K. Parker, a minor, for a writ of prohibition against the Honorable George D. Gear, second judge of the circuit court of the first circuit, at chambers, and John S. Low, next friend of Annie T. K. Parker, a minor;"

Now therefore the condition of this obligation is such that if the above named plaintiff in error shall prosecute the said writ of error to effect and answer all costs and damages if he shall fail to make

good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

In witness whereof the said principal has set his hand and seal, and the said surety has caused its corporate name to be signed and its corporate seal to be affixed by its attorney-in-fact thereunto duly authorized, this 8th day of November, 1904.

(S'g'd) ALFRED W. CARTER,
Guardian of the Property of Annie T. K. Parker, a Minor.
PACIFIC SURETY COMPANY,
(S'g'd) By ZENO K. MYERS, [SEAL.]
Attorney-in-Fact.

I hereby approve the foregoing bond and surety this 8th day of November, A. D. 1904.

(S'g'd) W. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

(Endorsed:) Supreme court Territory of Hawaii.—Alfred W. Carter, guardian etc. plaintiff in error *vs.* Hon. Geo. D. Gear, second judge etc. & John S. Low, next friend etc. defendants in error.—Bond on writ of error.—Filed November 8, 1904—Henry Smith, clerk—Ballou & Marx—303 Stangenwald bldg. Honolulu—attorneys for plaintiff in error.

69 The Supreme Court of the United States.

ALFRED W. CARTER, Guardian of the Property of Annie T. K. Parker, a Minor, Plaintiff in Error,
vs.
Honorable GEORGE D. GEAR, Second Judge of the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers, and John S. Low, Next Friend of Annie T. K. Parker, a Minor, Defendants in Error.
} Writ of Error.

Citation to Defendants in Error.

UNITED STATES OF AMERICA, *ss:*

To the Honorable George D. Gear, second judge of the circuit court of the first circuit, Territory of Hawaii, at chambers, and John S. Low, next friend of Annie T. K. Parker, a minor, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Hawaii, wherein Al-

fred W. Carter, guardian of the property of Annie T. K. Parker, a minor, is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness Honorable W. F. Frear, chief justice of the supreme court of the Territory of Hawaii, this 8th day of November, A. D. 1904.

(S'g'd) W. F. FREAR,
Chief Justice Supreme Court, Territory of Hawaii.

70 Copy of the within citation received this 8th day of November, A. D. 1904.

(S'g'd) J. ALFRED MAGOON,
J. LIGHTFOOT,
Attorneys for Defendants in Error.

(Endorsed:) In the United States Supreme Court.—Alfred W. Carter, guardian etc. plaintiff in error *vs.* Hon. Geo. D. Gear, second judge etc. and John S. Low, next friend. Defendants in error.—Citation to defendants in error.—Filed November 8, 1904.—Henry Smith, clerk—Ballou & Marx—303 Stangenwald bldg.—attorneys for plaintiff in error.

71 In the Supreme Court of the Territory of Hawaii.

In the Matter of the Application of ALFRED W. CARTER, Guardian of the Property of Annie T. K. Parker, a Minor, for a Writ of Prohibition against the Honorable George D. Gear, Second Judge of the Circuit Court of the First Circuit, at Chambers, and J. S. Low, Next Friend of Annie T. K. Parker, a Minor.

Certificate of Clerk to Transcript.

TERRITORY OF HAWAII, } ss:
Honolulu, Oahu, }

I, Henry Smith, clerk of the supreme court of the Territory of Hawaii, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the foregoing pages numbered from 1 to 58 inclusive, contain a true and complete transcript of the record and proceedings had in the above entitled court in the case entitled "In the matter of the application of Alfred W. Carter, guardian of the property of Annie T. K. Parker, a minor, for a writ of prohibition against the Honorable George D. Gear, second judge of the circuit court of the first circuit, at chambers and J. S. Low, next friend of Annie T. K. Parker, a minor," as the same remain of record and on file in my office.

I further certify that the foregoing pages numbered from 59 to 70 inclusive contain true and correct copies of the "petition for writ of error and order allowing writ and approving bond," "writ of error," "assignment of errors," "bond on writ of error" and "citation to defendants in error."

In testimony whereof I have caused the seal of said supreme court of the Territory of Hawaii to be hereunto affixed at Honolulu in said Territory, this 8th day of November, A. D. 1904.

[Seal Supreme Court, Territory of Hawaii.]

HENRY SMITH,
Clerk of the Supreme Court of the Territory of Hawaii.

[Endorsed:] Number 5993. Law division. Supreme court. *In re* application of A. W. Carter, guardian of the property of A. T. K. Parker, a minor, for a writ of prohibition against Hon. George D. Gear, second judge of the circuit court of the first circuit and John S. Low, next friend of Annie T. K. Parker, a minor. Certified transcript of record. Entered in docket vol. —, page —. Record vol. —, page —. —— ——, clerk.

Endorsed on cover: File No. 19,542. Territory of Hawaii supreme court. Term No. 442. Alfred W. Carter, guardian of the property of Annie T. K. Parker, a minor, plaintiff in error, *vs.* George D. Gear, second judge of the circuit court of the first circuit, Territory of Hawaii, *et al.* Filed November 28", 1904. File No. 19,542.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1904.

No. 449.

ALFRED W. CARTER, GUARDIAN OF THE PROPERTY OF ANNIE T. K. PARKER, A MINOR, PLAINTIFF IN ERROR,

vs.

HONORABLE GEORGE D. GEAR, SECOND JUDGE OF THE CIRCUIT COURT OF THE FIRST CIRCUIT, TERRITORY OF HAWAII, AT CHAMBERS, AND JOHN S. LOW, NEXT FRIEND OF ANNIE T. K. PARKER, A MINOR, DEFENDANTS IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

JOSEPH J. DARLINGTON,
WILLIAM F. MATTINGLY,
Attorneys for Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1904.

No. 442.

ALFRED W. CARTER, GUARDIAN OF THE PROPERTY OF ANNIE T. K. PARKER, A MINOR, PLAINTIFF IN ERROR,

vs.

HONORABLE GEORGE D. GEAR, SECOND JUDGE OF THE CIRCUIT COURT OF FIRST CIRCUIT, TERRITORY OF HAWAII, AT CHAMBERS, AND JOHN S. LOW, NEXT FRIEND OF ANNIE T. K. PARKER, A MINOR, DEFENDANTS IN ERROR.

And now comes said plaintiff in error, by Joseph J. Darlington and William F. Mattingly, his attorneys, and moves the court to grant and pass an order restraining said defendants in error from further proceedings in the matter of the amended motion and petition of Annie Thelma K. Parker, by her next friend, J. S. Low, to remove A. W. Carter as guardian, entitled: "In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. In Probate. At Chambers," or to grant unto the plaintiff in error such other or further relief in the premises as he may be lawfully entitled to, until the hearing of this case on the merits in this court.

JOSEPH J. DARLINGTON,
WILLIAM F. MATTINGLY,
Attorneys for Plaintiff in Error.

And said plaintiff in error files herewith in support of the foregoing motion the affidavit of Sidney M. Ballou, one of the attorneys for said Alfred W. Carter, entitled in this cause, made at Honolulu, Territory of Hawaii, which is as follows, viz:

Affidavit of Sidney M. Ballou.

HONOLULU, OAHU,
Territory of Hawaii. } ss.

SIDNEY M. BALLOU, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for Alfred W. Carter, guardian of the property of Annie T. K. Parker, a minor, plaintiff in error in the above entitled cause; that heretofore, to wit, on the 7th day of September, 1904, said plaintiff in error, by his attorneys, presented a petition for a writ of prohibition to the Honorable Walter F. Frear, Chief Justice of the Supreme Court of the Territory of Hawaii, which petition was entitled:

> "In the Supreme Court of the Territory of Hawaii. In the matter of the application of Alfred W. Carter, guardian of the property of Annie T. K. Parker, a minor, for a writ of prohibition against the Honorable George D. Gear, second judge of the Circuit Court of the First Circuit, at chambers, and J. S. Low, next friend of Annie T. K. Parker, a minor."

That thereafter, to wit, on said 7th day of September, 1904, a writ of prohibition issued, allowed by said Walter F. Frear, Chief Justice of the Supreme Court of the Territory of Hawaii, prohibiting said Honorable George D. Gear, second judge as aforesaid, from taking further cognizance of a certain "Amended motion and petition of Annie T. K. Parker, by her next friend, J. S. Low, to remove A. W. Carter as guardian," and from proceeding further therein, and prohibiting said J. S. Low, next friend of Annie T. K. Par-

ker, a minor, from proceeding further in said amended motion and petition until further order of the Supreme Court of the Territory of Hawaii.

That said petition for a writ of prohibition raised a Federal question, to wit, whether the statutes of the Territory of Hawaii purporting to confer judicial power and authority upon circuit judges at chambers to hear and determine judicial matters not incident or ancillary to any cause pending in some court are null and void, being in conflict with section 81 of an act of Congress entitled "An act to provide a government for the Territory of Hawaii," approved April 30, 1900, and commonly known as "The organic act of the Territory of Hawaii."

That said petition duly came on for hearing before the Supreme Court of the Territory of Hawaii, which rendered its decision therein on the 7th day of November, 1904, which decision was against said plaintiff in error and was based solely upon the ground that the Territorial statutes conferring such power upon circuit judges at chambers were not in contravention to said organic act, but were in full force still and valid; and thereupon, to wit, on said 7th day of November, 1904, a decree was filed by said Supreme Court of the Territory of Hawaii, which decree was entitled in said court and cause, and was in words and figures as follows, to wit:

IN THE SUPREME COURT OF THE TERRITORY OF HAWAII.

In the matter of the application of Alfred W. Carter, guardian of the property of Annie T. K. Parker, a minor, for a writ of prohibition against the Honorable George D. Gear, second judge of the Circuit Court of the First Circuit, at chambers, and J. S. Low, next friend of Annie T. K. Parker, a minor.

Decree.

The above entitled matter having duly come on for hearing before the full court, Messrs. Ballou & Marx appearing for petitioner, and J. Alfred

Magoon–J. Lightfoot for respondents, upon full consideration by the court, and in pursuance of the decision this day filed, the petition for permanent writ of prohibition is hereby denied, and the temporary writ heretofore issued herein is hereby dissolved.

Dated Honolulu, November 7th, 1904.

By the Court:

(Sgd.) GEORGE LUCAS, *Clerk.*

Approved as to form.

(Sgd.) BALLOU & MARX.

Indorsed and filed November 7, 1904.

That thereafter, to wit, upon the 8th day of November, 1904, affiant as attorney aforesaid and on behalf of said plaintiff in error, presented to the Honorable Walter F. Frear, chief justice of the Supreme Court of the Territory of Hawaii, a petition for a writ of error from the Supreme Court of the United States; that said Walter F. Frear, chief justice as aforesaid, signed an order allowing said writ of error, which order is in words and figures as follows, to wit:

IN THE SUPREME COURT OF THE TERRITORY OF HAWAII.

OCTOBER TERM, 1904.

Alfred W. Carter, Guardian of the Property of Annie T. K. Parker, a Minor, Plaintiff in Error, *vs.* Honorable George D. Gear, Second Judge of the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers, and John S. Low, Next Friend of Annie T. K. Parker, a Minor, Defendants in Error.	Writ of Error.

Order Allowing Writ of Error from the Supreme Court of the United States.

The above entitled matter coming on to be heard upon the petition of the petitioner therein for a writ of error from the Supreme Court of the United States

to the Supreme Court of the Territory of Hawaii, and upon examination of said petition and the record in said matter, and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter:

It is ordered that a writ of error be and is hereby allowed to this court from the Supreme Court of the United States, the writ of error to operate as a supersedeas, and that the bond for that purpose presented by said petitioner in the sum of $1,000 be and the same is hereby approved.

HONOLULU, *November 8, 1904.*

(Signed) W. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

That thereafter, upon said 8th day of November, 1904, affiant filed in the office of the clerk of the Supreme Court of the Territory of Hawaii said petition for a writ of error and order allowing writ of error, together with an assignment of errors and an approved bond in the sum of one thousand dollars ($1,000), whereupon, upon said 8th day of November, 1904, a writ of error issued in said cause under the hand and seal of Henry Smith, clerk of the Supreme Court of the Territory of Hawaii, and a citation to the defendants in error, to wit, the Honorable George D. Gear, second judge of the Circuit Court of the First Circuit, Territory of Hawaii, at chambers, and John S. Low, next friend of Annie T. K. Parker, a minor, and said citation, together with copies of all the appellate papers heretofore mentioned, was, on said 8th day of November, 1904, served by affiant upon J. Alfred Magoon, one of the attorneys for said defendants in error.

That thereafter, to wit, on the 9th day of November, 1904, said J. Alfred Magoon, as attorney for J. S. Low, next friend, presented before the Honorable George D. Gear, second judge as aforesaid, a motion which had been filed November 7, 1904, to set for hearing on its merits the "amended

motion and petition of Annie Thelma K. Parker, by her next friend, J. S. Low, to remove Alfred W. Carter as guardian;" that at the hearing of said motion, on said 9th day of November, 1904, affiant called the attention of said Honorable George D. Gear, second judge as aforesaid, to all of the appellate papers before mentioned, showing the originals thereof to said Honorable George D. Gear, and calling his attention to the supersedeas in said order allowing writ of error contained; but that said Honorable George D. Gear, second judge as aforesaid, did, on the 11th day of November, 1904, enter an order at chambers, setting said cause for hearing on its merits on the 21st day of November, A. D. 1904.

And affiant verily believes that unless restrained by suitable process issued by this Honorable Supreme Court of the United States, or by a justice thereof, said Honorable George D. Gear, second judge as aforesaid, will proceed to the hearing of said cause on its merits in defiance of the writ of prohibition heretofore issued and of the supersedeas to the decree dissolving the same; and affiant alleges that such proceeding will cause great and useless expense to said plaintiff in error and to the estate of the minor of whom he is guardian; that said trial will be long and costly, in that said plaintiff in error will be obliged to incur large expenses for costs and counsel fees and to incur large expenses for witnesses' fees in bringing a large number of witnesses from the island of Hawaii to Honolulu, and will thereby suffer great and irreparable injury.

And further affiant sayeth not.

SIDNEY M. BALLOU.

Subscribed and sworn to before me this 15th day of November, A. D. 1904.

[NOTORIAL SEAL.] R. W. ATKINSON,
Notary Public, First Judicial Circuit.

Brief Statement of Facts Appearing From the Record.

1904, July 27 (transcript, p. 22), "amended motion and petition" of J. S. Low, a next friend of said minor, for removal of Carter as guardian, before judge of circuit court, at chambers.

1904, September 2 (transcript, p. 23), opinion of Judge Gear overruling objection as to jurisdiction.

1904, September 7 (transcript, p. 3), petition of Carter to the Supreme Court of Hawaii for writ of prohibition *vs.* Judge Gear and Low, on ground that the judge at chambers was without jurisdiction to proceed to hear the case on its merits; that the statutes of Hawaii authorizing such hearing by a judge at chambers were null and void as being in conflict with Article III, section 1, of the Constitution of the United States, and that they were also void, being in conflict with section 81 of the act of Congress for the government of Hawaii, approved April 30, 1900 (31 Stat. 141).

1904, September 7 (transcript, p. 1), writ of prohibition issued.

1904, October 3 (transcript, pp. 29, 31), answers of Judge Gear and Low to the petition and writ

1904, November 7 (transcript, pp. 38 to 52), opinion of the Supreme Court, by Frear, C. J.

1904, November 7 (transcript, p. 53), decree of the Supreme Court of Hawaii, concluding, "the petition for permanent writ of prohibition is hereby denied, and the temporary writ heretofore issued herein is hereby dissolved."

1904, November 8 (transcript, p. 59), petition for writ of error from this court.

1904, November 8 (transcript, p. 61), order allowing writ of error.

This order recites on its face, "*and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said*

matter," the writ of error is allowed, "*the writ of error to operate as a sepersedeas;*" and the bond "*for that purpose, presented by said petitioner,*" is approved.

1904, November 8 (transcript, p. 62), writ of error.

1904, November 8 (transcript, p. 64), assignment of errors.

1904, November 8 (transcript, p. 67), approved bond on writ of error.

1904, November 8 (transcript, p. 69), citation to defendants in error and acknowledgment of service (p. 70) on same date.

Counsel for plaintiff in error in this court are advised by local counsel in Hawaii that the hearing upon which Judge Gear insists will occupy about one month.

Respectfully submitted.

JOSEPH J. DARLINGTON,
WM. F. MATTINGLY,
Attorneys for Plaintiff in Error.

FILE COPY.

FILED
FEB 21 1905
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 442.

ALFRED W. CARTER, GUARDIAN OF THE PROPERTY OF ANNIE T. K. PARKER, A MINOR, PLAINTIFF IN ERROR,

vs.

GEORGE D. GEAR, SECOND JUDGE OF THE CIRCUIT COURT OF THE FIRST CIRCUIT, TERRITORY OF HAWAII, AND JOHN S. LOW, NEXT FRIEND OF ANNIE T. K. PARKER, A MINOR, DEFENDANTS IN ERROR.

PROHIBITION.

In Error to the Supreme Court of the Territory of Hawaii.

BRIEF FOR PLAINTIFF IN ERROR.

JOSEPH J. DARLINGTON,
WM. F. MATTINGLY,
Attorneys for Plaintiffs in Error.

LAW REPORTER PRINTING CO., WASHINGTON, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 442.

ALFRED W. CARTER, GUARDIAN OF THE PROPERTY OF ANNIE T. K. PARKER, A MINOR, PLAINTIFF IN ERROR,

vs.

GEORGE D. GEAR, SECOND JUDGE OF THE CIRCUIT COURT OF THE FIRST CIRCUIT, TERRITORY OF HAWAII, AND JOHN S. LOW, NEXT FRIEND OF ANNIE T. K. PARKER, A MINOR, DEFENDANTS IN ERROR.

PROHIBITION.

In Error to the Supreme Court of the Territory of Hawaii.

BRIEF FOR PLAINTIFF IN ERROR.

I.

Statement of the Case.

John S. Low, as next friend of Annie T. K. Parker, a minor, filed an "Amended motion and petition" to remove A. W. Carter as guardian, before George D. Gear, Second Judge of the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers. The matter was brought and is pending before the Circuit Judge at

Chambers under the provisions of the following laws of Hawaii:

Sections 37 and 38 of Chapter 57 of the Laws of 1892 (Civil Laws Sections 1145-1146), as amended by Sections 11-12 of Act 32 of the Laws of 1903, and also Sections 1343-1395 of the Civil Code of 1859 (Civil Laws Chapter 126) as amended by Act 16 of the Laws of 1903. (Decision of Hawaiian Supreme Court, Transcript 22.)

These laws are stated in full hereafter. It is admitted that if valid they confer upon the Circuit Judge at Chambers power to hear and determine matters of this nature.

While this matter was pending before the Circuit Judge at Chambers, a petition for a Writ of Prohibition against the present defendants in error was filed in the Supreme Court of the Territory of Hawaii and a preliminary Writ of Prohibition was issued. The ground for prohibition as set forth in the petition, exclusive of formal allegations, was:

"That said statutes and each of them and all statutes of the Territory of Hawaii purporting to confer judicial power and authority upon circuit judges at Chambers to hear and determine judicial matters not incident or ancillary to any cause pending in some court, are and each of them is null and void, being in conflict with section 81 of an act of Congress entitled 'An Act to provide a government for the Territory of Hawaii,' approved April 30, 1900, and reading as follows: 'Section 81. That the judicial power of the Territory shall be vested in one supreme court, circuit courts and in such inferior courts as the legislature may from time to time establish. And until the legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the several courts and their jurisdiction and procedure shall continue in force, except as herein otherwise provided."

Upon final hearing the Supreme Court of the Territory of Hawaii denied the permanent Writ of Prohibition and dissolved the temporary writ. Its decision was based exclusively on the ground that the Hawaiian statutes in question were not in conflict with the section of the Organic Act above quoted but were valid From this decision and decree the plaintiff in error sued out a Writ of Error to this court.

II.

Statement of Errors Relied Upon.

The errors relied upon, as appear from the assignment of errors on file (Transcript, page 38), are as follows:

"First. That the court erred in holding that the statutes of the Territory of Hawaii purporting to confer upon the judges of the several circuit courts, at Chambers, within their respective jurisdictions, judicial power not incident or ancillary to some cause pending before a court are not in conflict with and in violation of the provisions of section 81 of an Act of Congress entitled 'An Act to provide a government for the Territory of Hawaii,' approved April 30th, 1900, and commonly known as 'the organic act of the Territory of Hawaii.'

"Second. That the court erred in holding that the statutes of the Territory of Hawaii purporting to confer upon the judges of the several circuit courts, at Chambers, within their respective jurisdictions, judicial power not incident or ancillary to some cause pending before a court were not repealed by said act of Congress entitled 'An Act to provide a government for the Territory of Hawaii,' approved April 30th, 1900,

and commonly known as 'the organic act of the Territory of Hawaii;'

"Third. That the court erred in holding that the provisions of sections 37 and 38 of chapter 57 of the Session Laws of the Territory of Hawaii for 1892; sections 1343 to 1395 of the Civil Code of 1859; act 16 of the Session Laws of the Territory of Hawaii for 1903; and sections 11 and 12 of act 32 of the Session Laws of the Territory of Hawaii for 1903, and each of said sections and acts are not in conflict with and in violation of the provisions of section 81 of an act of Congress entitled 'An Act to provide a government for the Territory of Hawaii,' approved April 30th, 1900, and commonly known as 'the organic act of the Territory of Hawaii;'

"Fourth. That the court erred in holding that the Honorable George D. Gear, second judge of the circuit court of the first circuit, at Chambers, had jurisdiction of the proceedings to remove Alfred W. Carter as guardian of the property of Annie T. K. Parker, a minor;

"Fifth. That the court erred in ordering judgment to be entered and in entering judgment denying a permanent writ of prohibition and dissolving the temporary writ issued herein on the 7th day of September, A. D. 1904."

The question to be presented to this court, therefore, may be broadly stated as a single question, to-wit, the validity or invalidity under section 81 of the Organic Act of the Territory of Hawaii of the above mentioned laws of the Territory of Hawaii, which are here printed in full.

Sections 37 and 38 of Chapter 57 of the Laws of 1892.

CIRCUIT JUDGES IN CHAMBERS.

Section 37. The Judges of the several Circuit Courts shall have power in Chambers within their respective jurisdictions, but subject to appeal to the Circuit and Supreme Courts according to law, as follows:

First. To hear and determine all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a remedy at law, where such remedy exists;

Second. To hear and determine all matters in Equity;

Third. To hear and determine all matters in bankruptcy;

Fourth. To grant probate of wills, to appoint administrators and guardians, and to compel executors, administrators and guardians to perform their respective trusts and to account in all respects for the discharge of their official duties; to remove any executor, administrator, or guardian; to determine the heirs at law of deceased persons and to decree the distribution of interstate estates;

Fifth. To admeasure dower and partition real estate; when the dower in real estate cannot be set apart without great injury to the owners, the Judge may ascertain the value of such dower in money, and order the same to be paid in such terms as shall be just and reasonable; when the partition of real estate cannot be made without great prejudice to the parties, the Judge may order a sale of the premises and divide the proceeds;

Sixth. To legalize the adoption of children and to decree the affiliation of bastards;

Seventh. To select and impannel—subject to challenge for cause by either party, a special jury of inquiry of idiocy, lunacy, or *de ventre inspiciendo,* or in any other matter to be tried before any of said Judges in Chambers, and they shall receive and act upon the verdict of such jury as equity and good conscience require;

Eighth. To issue writs of *habeas corpus* according to law;

Ninth. To issue writs of error, *certiorari, mandamus nc exeat regno,* prohibition and *quo warranto,* and all other writs and processes, to Courts of inferior jurisdiction, to corporations and individuals, that shall be necessary to the furtherance of justice and the regular execution of the laws;

Tenth. To enlarge on bail persons rightfully confined in all bailable cases;

Eleventh. To require either the plaintiff or defendant, upon the application of the opposite party, to give security for costs in any civil cause, upon such terms and conditions as the Judge shall deem just;

Twelfth. To issue warrants for the apprehension, in any part of the Kingdom, of any person accused under oath of a crime or misdemeanor committed within his jurisdiction and to examine and commit such person to prison according to law, for trial.

Section 38. Provided, however, that the powers and jurisdiction of Circuit Courts and of Circuit Judges in Chambers relating to causes of a civil nature as hereinbefore defined, shall be limited, as follows:

First. Causes described in the second division of Section 36 shall be triable only in the Circuit where it is alleged the penalty or forfeiture was incurred;

Second. Causes of divorce, separation, or nullity of marriage, which shall be triable only in the Circuit

where the parties last lived together as man and wife;

Third. Causes of bankruptcy, which shall be heard only in the Circuit where the alleged bankrupt has had his business headquarters, or in the First Circuit;

Fourth. Proceedings for the probate of wills and for the appointment of administrators and trustees of the estates of deceased persons, for the admeasurement of dower and for all matters relating to the administration and settlement of estates of deceased persons, which shall be brought only in the Circuit where the deceased had his last residence, or in the First Circuit;

Fifth. Proceedings for the appointment of guardians and for all matters concerning the relation of guardian and ward, which shall be brought in the circuit where the person or a majority of the persons reside, in behalf of whom such proceedings are begun;

Sixth. Proceedings for the partition of real estate, which shall be brought only in the Circuit where the real estate, partition of which is prayed for, is situated, or in the First Circuit;

Seventh. The power of legalizing the adoption of children, and decreeing the affiliation of bastards, shall be in the Judge of the Circuit where the parents of the child in question reside;

Eighth. The power of issuing writs as provided in the ninth division of Section 37, shall be in the Judge of the Circuit in which the alleged occasion for relief by any such writ, shall arise. Provided, however, that in case any such writ shall be necessary in the prosecution or furtherance of any cause or proceeding already begun or pending before any Circuit Court or Judge, the power of issuing such writ shall be in the Court or Judge before whom such cause or proceeding has been begun or is pending, even though the alleged occasion for relief shall have arisen in another Circuit.

(These are Sections 1145 and 1146 of the Civil Laws of 1897.)

Sections 11 and 12 of Act 32 of the Laws of 1903.

SECTION 11. Section 37 of said chapter LVII (Civil Laws, Sec. 1145), is hereby amended so as to read as follows:

"SECTION 37. The judges of the several Circuit Courts shall have power at Chambers within their respective jurisdictions, but subject to appeal to the Circuit and Supreme Courts, according to law, as follows:

"First. To hear and determine all matters in equity;

"Second. To hear and determine all matters of divorce, separation and annulment of marriage;

"Third. To grant probate of wills, to appoint administrators and guardians, and to compel executors, administrators and guardians, to perform their respective trusts and to account in all respects for the discharge of their official duties; to remove any executor, administrator, or guardian; to determine the heirs at law of deceased persons and to decree the distribution of intestate estates;

"Fourth. To admeasure dower and partition real estate; when the dower in real estate cannot be set apart without great injury to the owners, the judge may ascertain the value of such dower in money, and order the same to paid on such terms as shall be just and reasonable; when the partition of real estate cannot be made without great prejudice to the parties, the judge may order a sale of the premises and divide the proceeds;

"Fifth. To legalize the adoption of children and to decree the affiliation of bastards:

"Sixth. To select and impannel, subject to challenge, for cause, by either party, a special jury of inquiry of idiocy, lunacy, or *de ventre inspiciendo*, or in any other

matter to be tried before any of the said judges at Chambers, and they shall receive and act upon the verdict of such jury as equity and good conscience require;

"Seventh. To issue writs of habeas corpus according to law:

"Eighth. To issue writs of error, *certiorari*, *mandamus*, *ne exeat regno*, prohibition and *quo warranto*, and all other writs and processes, according to law, to courts of inferior jurisdiction, to corporations and individuals, that shall be necessary to the furtherance of justice and the regular execution of the law.

"Ninth. To enlarge on bail persons rightfully confined in all bailable cases;

"Tenth. To require either the plaintiff or defendant upon the application of the opposite party, to give security for costs in any civil cause, upon such terms and conditions as the judge shall deem just;

"Eleventh. To issue warrants for the apprehension, in any part of the Territory, of any person accused under oath of a crime or misdemeanor committed in any part of the Territory and to examine and commit such person to prison according to law, for trial before the Circuit Court of the circuit in which the offense was committed, to fix bail and generally to perform the duties of a committing magistrate."

Section 12. Section 38 of said chapter LVII (Civil Laws, Sec. 1146), as amended by act 56 of the laws of 1898, is hereby amended so as to read as follows:

"Section 38. Provided, however, that the power and jurisdiction of Circuit Courts and Circuit Judges in Chambers relating to causes of a civil nature as hereinbefore defined, shall be limited as follows:

"First. Causes described in the second division of Section 36 shall be triable only in the Circuit where it is alleged the penalty or forfeiture was incurred;

"Second. Actions of ejectment, actions to quiet title

in real property and actions of trespass *quare clausum fregit* shall be triable only in the Circuit in which the real property in question is situated;

"Third. Causes of divorce, separation, and nullity of marriage, shall be triable only in the Circuit where the parties last lived together as man and wife, or, if they have not last so lived together in this Territory, in the Circuit in which the applicant resides;

"Fourth. Proceedings for the probate of wills, for the appointment of administrators and trustees of the estates of deceased persons, for the admeasurement of dower and for all matters relating to the administration and settlement of estates of deceased persons, shall be brought only in the Circuit where the deceased had his last domicile. Provided, that if the deceased was last domiciled without this Territory, the proceeding may be brought in any Circuit in which there is estate to be administered;

"Fifth. Proceedings for the appointment of guardians and for all matters concerning the relation of guardian and ward, shall be brought in the Circuit in which the person or a majority of such persons are domiciled, in whose behalf such proceedings are begun. Provided, that if such person is domiciled without the Territory, or a majority of such persons are so domiciled, the proceedings may be brought in any Circuit in which there is estate of such person or persons;

"Sixth. Proceedings for the partition of real estate shall be brought only in the Circuit where the real estate, partition of which is prayed for, is situated. Provided, that if such real estate lies in more than one Circuit the proceedings may be had in any Circuit in which the same or any part thereof is situated;

"Seventh. Proceedings for legalizing the adoption of children and decreeing the affiliation of bastards, shall

be brought in the Circuit in which the parents, or either of them, of the children in question reside. Provided, that if, in case of adoption, such parents are deceased or if neither of them resides within the Territory the proceedings may be brought in the Circuit in which the adopting parent or parents reside;

"Eighth. The power of issuing writs of error and other writs specifically named in the eighth sublivision of section 37, as amended, shall be in the Judge of the Circuit in which the alleged occasion for relief by any such writ be necessary in the prosecution or furtherance of any cause or proceeding already begun or pending before any Circuit Court or Judge, the power of issuing such writ shall be in the Court or Judge before whom such case or proceeding has been begun or is pending, even though the alleged occasion for relief shall have arisen in another Circuit."

Chapter XXIX. Civil Code of 1859.

OF GUARDIANS AND WARDS.

Section 1342. Any Judge of the Supreme Court of law and equity, when it shall appear to him necessary or convenient, may appoint guardians to minors and others, being inhabitants of or residents in any part of this kingdom, or who may reside without this kingdom, and have any estate within the same.

Section 1343. Any Circuit Judge of this kingdom may, when it shall appear to him necessary or convenient, appoint guardians to minors and others, being inhabitants of or residents in the Circuit in which he is a Judge.

Section 1344. If the minor is under the age of thirteen years, the judge of probate may nominate and appoint his guardian, and if he is above the age of thirteen years, he may nominate his own guardian, who, if

approved of by the judge, shall be appointed accordingly, and if the guardian, nominated by such minor, shall not be approved by the judge, or if the minor shall reside without the kingdom, or if after being cited by the judge, he shall neglect to nominate a suitable person, the judge may nominate and appoint the guardian, in the same manner, as if the minor were under the age of thirteen years.

Section 1345. Every guardian appointed as aforesaid, shall have the custody and tuition of the minor, and the care and management of his estate, and shall continue in office until the minor shall arrive at the age of twenty years, or until the guardian shall be discharged according to law; provided, however, that the father of the minor, if living, and in case of his death, the mother, while she remains unmarried, being themselves respectively competent to transact their own business, shall be entitled to the custody of the person of the minor, and to the care of his education.

Section 1346. Every such guardian shall give a bond, with surety or sureties, to the judge of probate, in such sum as the judge shall order, with conditions as follows:

First. To make a true inventory of all the real estate, and all the goods, chattels, rights and credits of the ward, that shall come to his possession or knowledge, and to return the same into the probate court at such times as the judge shall order;

Secondly. To dispose of and manage all such estate and effects according to law, and for the best interest of the ward, and faithfully to discharge his trust in relation thereto, and also in relation to the custody, education and maintenance of the ward;

Thirdly. To render an account, on oath, of the property in his hands, including the proceeds of all real es-

tate sold by him, and of the management and disposition of all such property, within one year after his appointment, and at such times as the judge of probate shall direct;

Fourthly. At the expiration of his trust, to settle his accounts with the judge of probate, or with the ward, or his legal representatives, and to pay over and deliver all his estate and effects remaining in his hands, or due from him on such settlement, to the person or persons who shall be lawfully entitled thereto.

Section 1347. Every father may, by his last will in writing, appoint a guardian or guardians for any of his children, whether born at the time of making the will, or afterward, to continue during the minority of the child, or for any less time, and every such testamentary guardian shall have the same powers, and shall perform the same duties, with regard to the person and the estate of the ward, as a guardian appointed by the judge of probate.

Section 1348. Every such testamentary guardian shall give a bond in like manner, and with like condition, as is before required of a guardian appointed by the judge of probate, provided that when the testator, in the will appointing the guardian, shall have ordered or requested that such bond shall not be given, the bond shall not be required, unless from a change in the situation or circumstances of the guardian or for other sufficient cause, the judge of probate shall think proper to require it.

Section 1349. Nothing contained in this chapter shall impair or affect the power of any judge of the Supreme Court, or Circuit Court, to appoint a guardian to defend the interests of any minor impleaded in such court, or interested in any suit or matter there pending, nor their power to appoint or allow any person as next

friend for a minor, to commence, prosecute, or defend any suit in his behalf.

Section 1350. When the relations or friends of any insane person shall apply to any of the judges hereinbefore mentioned, to have a guardian appointed for him, the judge shall cause notice to be given to the supposed insane person, of the time and place appointed for hearing the case, not less than fourteen days before the time so appointed, and if after a full hearing, it shall appear to the judge that the person in question is incapable of taking care of himself, the judge shall appoint a guardian of his person and estate, with the powers and duties hereinafter specified.

Section 1351. Every guardian so appointed for an insane person, shall have the care and custody of the person of the ward, and management of all his estate, until the guardian shall be legally discharged, and he shall give bond to the judge appointing him, in like manner, and with the like condition, as is before prescribed with respect to the guardian of a minor, excepting that the provision relating to the education of the ward, shall be omitted in the condition of the bond.

1352. When any person by excessive drinking, gaming, idleness, or debauchery of any kind, shall so spend, waste or lessen his estate, as to expose himself or his family to want or suffering, his friends or relations may present a complaint to any of the judges hereinbefore mentioned, setting forth the facts and circumstances of the case, and praying to have a guardian appointed for him.

1353. The judge shall cause notice to be given to such supposed spendthrift, of the time and place appointed for hearing the case, not less than fourteen days before the time so appointed; and if, after a full hearing, it shall appear to the judge that the person

complained of comes within the description contained in section 1352, he shall appoint a guardian of his person and estate, with the powers and duties hereinafter specified.

Section 1354. After the order of notice has been issued, the complainants may cause a copy of the complaint, with the order of notice, to be filed in the office of the registrar of conveyances, and if a guardian shall be appointed upon such application, all contracts, excepting for necessaries, and all gifts, sales or transfers, of real or personal estate, made by such spendthrift after such filing of the complaint in the registry of conveyances, and before the termination of the guardianship, shall be null and void.

Section 1355. When a guardian shall be appointed for an insane person, or spendthrift, the judge shall make an allowance to be paid by the guardian, for all reasonable expenses incurred by the ward in defending himself against the complaint.

Section 1356. Every guardian, so appointed for a spendthrift, shall have the care and custody of the person of the ward, and the management of all his estate, until the guardian shall be legally discharged, and he shall give bond to the judge appointing him, in like manner and with the like condition, as is before directed with respect to the guardian of an insane person.

Section 1357. Every guardian appointed under the provisions of this chapter, whether for a minor or any other person, shall pay all just debts due from the ward, out of his personal estate, if sufficient, and if not, out of his real estate, upon obtaining a license for the sale thereof, as hereinafter provided; he shall also settle the accounts of the ward, and demand, sue for, and receive all debts due to him, or may, with the approba-

tion of any of the judges hereinbefore specified, compound for the same, and give a discharge to the debtor, upon receiving a fair and just dividend of his estate and effects, and he shall appear for and represent his ward, in all legal suits and proceedings, unless where another person is appointed for that purpose, as guardian or next friend.

Section 1358. The guardian shall also manage the estate of the ward frugally, and without waste, and apply the income and profits thereof, so far as may be necessary, for the comfortable and suitable maintenance and support of the ward and his family, if there be any; and if the income and profits shall be insufficient for that purpose, the guardian may sell the real estate, upon obtaining a license therefor as provided by law, and shall apply the proceeds of such sale, so far as may be necessary, for the maintenance and support of the ward and his family.

Section 1359. The guardian may join in and assent to a partition of the real estate of the ward, either upon a petition for partition, or otherwise; and he may assign and set out dower in the said estate to any widow entitled thereto, and may appoint an appraiser of real estate on any execution, either against or in favor of his ward.

Section 1360. Upon the taking of any inventory, required by this chapter, the estate and effects comprised therein shall be appraised by three suitable persons, to be appointed and sworn by the judge, and every guardian shall account for, and dispose of, the personal estate of the ward, as directed by the judge.

Section 1361. When any guardian appointed either by a testator or by any of the judges hereinbefore mentioned, shall become insane or otherwise incapable of discharging his trust, or evidently unsuitable therefor,

any of said judges, after notice to such guardian, and to all others interested, may remove him; and every guardian may, upon his request, be allowed to resign his trust, when it shall appear to the judge proper to allow the same; and upon every such resignation or removal, and also upon the death of any guardian, the judge of probate may appoint another in his stead.

Section 1362. The marriage of any female who is under guardianship, as a minor, shall operate as a legal discharge to her guardian; and the guardian of any insane person, or spendthrift, may be discharged by any judge of probate, when it shall appear to him, on the application of the ward, or otherwise, that such guardianship is no longer necessary.

Section 1363. Any court of probate may require a new bond to be given by any guardian, and may discharge the existing sureties from future responsibility, whenever such court may deem it proper so to do.

Section 1364. Any bond given by a guardian, may be put in suit by order of a judge of probate, for the use and benefit of the ward, or of any person interested in his estate.

Section 1365. No action shall be maintained against the sureties in any bond, given by a guardian, unless it be commenced within four years from the time when the guardian shall be discharged, provided that if at the time of such discharge, the person entitled to bring such action shall be out of the kingdom, the action may be commenced at any time within four years after his return to the kingdom.

Section 1366. Upon complaint made to a judge of probate by any guardian, or by the ward, or by any creditor or other person interested in the estate, or by any persons having claims thereto in expectancy as heir or otherwise, against anyone suspected of having concealed,

embezzled, or conveyed away any of the money, goods or effects of the ward, the judge may cite and examine such suspected person, and proceed with him as to such charge, in the same manner as with persons suspected of concealing or embezzling, the effects of a deceased testator or intestate.

Section 1367. When any minor, or other person liable to be put under guardianship, according to the provisions of this chapter, shall reside without this kingdom, and shall have any estate therein, any friend of such person, or anyone interested in his estate, in expectancy or otherwise, may apply to any judge of the Supreme Court of law and equity, and after notice to all persons interested, to be given in such manner as the judge shall order, and after a full hearing and examination, if it shall appear to him proper, he may appoint a guardian for such absent person.

Section 1368. Every guardian appointed according to the provisions of the last preceding section, shall have the same powers and duties, with respect to any estate of the ward, that shall be found within the kingdom, and also with respect to the person of the ward, if he shall come to reside therein, as are prescribed with respect to any other guardian, appointed under this chapter.

Section 1369. Every such guardian shall give bond to the judge appointing him, in like manner and with the like conditions, as is above provided with respect to other guardians; excepting that the provisions respecting the inventory, the disposal of the estate and effects, and the account to be rendered by the guardian, shall be confined to such estate and effects as shall come to his hands in this kingdom, and that the provisions respecting the custody of the ward, shall not be applicable, unless the ward shall come to reside within this kingdom.

Section 1370. Every guardian shall be allowed the

amount of all his reasonable expenses, incurred in the execution of his trust, and he shall also have such compensation for his services, as the court, in which his accounts are settled, shall consider to be just and reasonable.

Section 1371. When an account is rendered by two or more joint guardians, the court may, in its discretion, allow the same, upon the oath of any one of them.

Section 1372. The words "insane person," are intended to include every idiot, non-compos, lunatic, and distracted person, and the word "spendthrift" is intended to include every one who is liable to be put under guardianship, on account of excessive drinking, gaming, idleness or debauchery; and these words shall be so construed in all the provisions relating to guardians and wards, contained in this or any other statute.

Section 1373. When the income of the estate of any person under guardianship, whether as a minor, insane person, or spendthrift, shall be insufficient to maintain the ward and his family, his guardian may sell his real estate for that purpose, upon obtaining a license therefor, and proceeding therein in the manner hereinafter provided.

Section 1374. When it shall appear, upon the representation of any such guardian that it would be for the benefit of his ward that his real estate, or any part thereof, should be sold, and the proceeds thereof be put on interest, or invested in some productive stock, his guardian may sell the same accordingly, upon obtaining a license therefor, and proceeding therein as hereinafter provided.

Section 1375. If the estate is sold for the maintenance of the ward and his family, as provided in section 1358, the guardian shall apply the proceeds of the sale to that purpose, as far as necessary, and shall put out the

residue, if any, on interest, or invest it in the best manner in his power, until the capital shall be wanted for the maintenance of the ward and his family, in which case the capital may be used for that purpose, as far as may be necessary, in like manner as if it had been personal estate of the ward.

Section 1376. If the estate is sold, in order to put out and invest the proceeds, as provided in section 1374, the guardian shall make the investment according to his best judgment, or in pursuance of any order that may be made relating thereto, by the court granting him the license to sell.

Section 1377. In every case of the sale of real estate, as provided in this chapter, the residue of the proceeds, if any, remaining upon the final settlement of the accounts of the guardianship, shall be considered as real estate of the ward, and shall be disposed of among the same persons and in the same proportion, as the real estate would have been, if it had not been sold.

Section 1378. Such license, in either of the cases aforesaid, may be granted by any judge of the Supreme Court of law and equity, or by any circuit judge of the island in which the estate intended to be sold lies; but in cases where the ward resides without the kingdom, such license shall be granted only by a judge of the Supreme Court of law and equity.

Section 1379. In order to obtain such license, the guardian shall present to the court a petition, setting forth the condition of the estate, and the facts and circumstances on which the petition is founded, tending to show the necessity or expediency of a sale; and if after a full examination, on the oath of the petitioner, or otherwise, it shall appear to the court, either that it is necessary, or that it would be for the benefit of the ward, that the real estate or any part of it should be sold, the

court may grant a license therefor, specifying therein whether the sale is to be made for the maintenance of the ward and his family, or in order that the proceeds may be put out and invested as aforesaid.

Section 1380. No such license shall be granted until notice by public advertisement or otherwise, as the court shall order, shall have been given to the next of kin of the ward, and to all persons interested in the estate, to appear and show cause why the same should not be granted.

Section 1381. Every guardian licensed to sell real estate as aforesaid, shall, before the sale, give bond to the judge granting the license, with sufficient surety or sureties, with condition to sell the same in the manner prescribed by the judge, and to account for and dispose of the proceeds of the sale, in the manner provided by law.

Section 1382. Such guardian shall also, before fixing on the time and place of sale, take and subscribe an oath in substance as follows: That in disposing of the estate which he is licensed to sell, he will use his best judgment, in fixing the time and place of sale, and that he will exert his utmost endeavors to dispose of the same, in such manner as will be most for the advantage of all persons interested therein.

Section 1383. He shall also give public notice of the time and place of sale, by causing notifications thereof to be posted up in the most public places, on the island where the estate to be sold is, and if it be on the island of Oahu, he shall also cause a notice of such sale to be published in the Government Gazette, at least fourteen days previous to the day of sale.

Section 1384. A copy of such notification certified by the oath of the guardian, or of the person employed by him to give such notice, being made before any judge of

probate, and filed in his office, within one year after the sale, shall be admitted as evidence of the time, place and manner of giving notice.

Section 1385. No license granted in pursuance of this chapter, shall be in force for more than one year after the time of granting the same.

Section 1386. When any minor, insane person, or spendthrift, residing without the kingdom, shall be put under guardianship in the country in which he resides, and shall have no guardian appointed in this kingdom, the foreign guardian may file an authenticated copy of his appointment, in the Supreme Court of law and equity, after which he may be licensed by any judge of the said court, to sell the real estate of the ward, in any part of this kingdom, in the same manner and on the same terms and conditions as are prescribed in this chapter, in the case of a guardian appointed in this kingdom, excepting in the particulars hereinafter mentioned.

Section 1387. Every foreign guardian, so licensed to sell real estate, shall take and subscribe the oath required in like case of guardians appointed in this kingdom, and shall give notice of the time and place of sale, and conduct the same in the manner prescribed for guardians appointed here, and may perpetuate the evidence of the notice in the same manner.

Section 1388. All the proceedings required to be had in any probate court in this kingdom, respecting such sale by a foreign guardian, shall be had in the Supreme Court of law and equity.

Section 1389. Upon every such sale by a foreign guardian, the proceeds of the sale, or as much thereof as may remain upon the final settlement of the guardianship, shall be considered as real estate of the ward, and shall be disposed of among the same persons, as

the real estate would have been, according to the laws of this kingdom, if it had not been sold; and the foreign guardian shall in every case, before making the sale, give bond, with sufficient surety or sureties, to the judge granting the license to sell, with condition to account for and dispose of the same accordingly.

Section 1390. If any person shall appear and object to the granting of any license, prayed for under the provisions of this chapter, and if it shall appear to the court or judge, that either the petition, or the objection thereto, is unreasonable, they may in their discretion, award costs for the party prevailing in the case.

Section 1391. No action for the recovery of any estate, sold by a guardian under the provisions of this chapter, shall be maintained by the ward, or by any person claiming under him, unless it be commenced within five years next after the termination of the guardianship; and no entry shall be made, unless by judgment of law, upon any lands sold as aforesaid, with a view to avoid the sale, after the expiration of the said five years; excepting only, that persons out of the kingdom, and minors and others under any legal disability to sue at the time when the right of action or of entry shall first accrue, may commence their action or make their entry, at any time within five years after the removal of the disability, or after their return to this kingdom.

Section 1392. In case of an action relating to any estate, sold by a guardian, under the provisions of this chapter, in which the ward, or any person claiming under him, shall contest the validity of the sale, the same shall not be avoided on account of any irregularity in the proceedings, provided it shall appear:

First. That the guardian was licensed to make the sale, by a judge of competent jurisdiction.

Secondly. That he gave a bond, which was approved by the judge of probate, in case any bond were required by the court, upon granting the license.

Thirdly. That he took the oath prescribed in this chapter.

Fourthly. That he gave notice of the time and place of the sale, as prescribed herein.

Fifthly. That the premises were sold accordingly by public auction, and are held by one who purchased them in good faith.

Section 1393. If in relation to such sale, there should be any neglect or misconduct in the proceedings of the guardian, by which any person interested in the estate shall suffer damage, such aggrieved party may recover compensation therefor, in a suit on the guardianship bond, or otherwise, as the case may require.

Section 1394. If the validity of any sale, made by a guardian under the provisions of this chapter, shall be drawn in question by any person claiming adversely to the title of the ward, the sale shall not be held void, on account of any irregularity in the proceedings, provided it shall appear that the guardian was licensed to make the sale, by a judge of competent jurisdiction, and that he did accordingly execute and acknowledge, in legal form, a deed of conveyance of the premises.

Section 1395. All sales, exchanges, transfers, gifts and conveyances of any estate or portion of an estate, of any ward of this kingdom, which may have been made by any guardian of such ward, previous to the fourth day of August, A. D. 1851, shall be and the same are hereby confirmed as legal and valid.

(Section 1342 was repealed by Chapter 57 of the Laws of 1892. The remaining sections constitute Chapter 126 of the Civil Laws of 1897.)

Act 16. Laws of 1903.

AN ACT relating to Guardians and Wards.

Be it enacted by the Legislature of the Territory of Hawaii.

Section 1. Section 1343 of the Civil Code (Civil Laws, Sec. 1956) is hereby amended so as to read as follows:

"Section 1343. Circuit Judges shall have judisdiction to appoint guardians to minors and others according to Law."

Section 2. Section 1349 of the Civil Code (Civil Laws, Sec. 1962) is hereby amended so as to read as follows:

"Section 1349. Nothing contained in this Chapter shall impair or affect the power of any court or judge to appoint a guardian to defend the interests of any minor impleaded in such court or before such judge, or interested in any suit or matter there pending, or their power to appoint or allow any person as next friend for a minor, to commence, prosecute, or defend any suit in his behalf."

Section 3. Section 1367 of the Civil Code (Civil Laws, Sec. 1980) is hereby amended so as to read as follows:

"Section 1367. When any minor or other person liable to be put under guardianship according to the provisions of this Chapter, shall reside without this Territory, and shall have any estate therein, any friend of such person, or any one interested in his estate, in expectancy or otherwise, may apply to a Circuit Judge in any Circuit in which there is property belonging to such minor or other person and, after notice to all persons interested, to be given in such manner as the Judge shall order or as shall be required by law or rule of Court, and after a full hearing and examination, if it shall appear

to him proper, he may appoint a guardian for such absent person."

Section 4. Section 1378 of the Civil Code (Civil Laws, Sec. 1991) is hereby amended so as to read as follows:

"Section 1378. Such license in either of the cases aforesaid may be granted by any Circuit Judge of the Circuit in which any of the estate intended to be sold lies."

Section 5. Section 1386 of the Civil Code (Civil Laws, Sec. 1999) is hereby amended so as to read as follows:

"Section 1386. When a minor, insane person, or spendthrift residing without the Territory, shall be put under guardianship in the country in which he resides, and shall have no guardian appointed in this Territory, the foreign guardian may file an authenticated copy of his appointment in the Circuit Court of any Circuit in which there is property belonging to such minor, insane person, or spendthrift, after which he may be licensed to sell the real estate of the ward, and may otherwise act, in the same manner and on the same terms and conditions as are prescribed in this Chapter in the case of a guardian appointed in this Territory, excepting in the particulars hereinafter mentioned."

Section 6. Sections 1344, 1346-1348, 1361-1364, 1366, 1370, 1371, 1376, 1379, 1380, 1383 (as amended by Chapter XXXIV of the Laws of 1874), 1384, 1390 and 1392 of the Civil Code (Civil Laws, Secs. 1957, 1959-61, 1974-1977, 1979, 1983, 1984, 1989, 1992, 1993, 1996, 1997, 2003 and 2005) are hereby amended by striking therefrom the words "of probate" and "Court" wherever they occur and by inserting in lieu of the word "court" where so stricken out the word "Judge."

Section 7. Section 1388 of the Civil Code (Civil Laws, Sec. 2001) is hereby repealed.

Section 8. This act shall take effect on the day of its approval.

Approved this 1st day of April, A. D. 1903.

SANFORD B. DOLE,
Governor of the Territory of Hawaii.

The question to be presented, therefore, is whether or not the foregoing statutes of the Territory of Hawaii, purporting to confer jurisdiction upon circuit judges at chambers, to hear and determine judicial matters not incident or ancillary to a cause pending in any court, are null and void, being in contravention with section 81 of the Organic Act of the Territory of Hawaii.

III.

Brief of the Argument.

A. Decisions under similar Constitutional Provisions.

Section 81 of the Organic Act of the Territory of Hawaii is practically identical with the constitutional provisions of many States, and under these constitutional provisions similar statutes, purporting to confer upon circuit judges at chambers, judicial power not incident or ancillary to a cause pending in any court, have invariably been declared unconstitutional.

"Sec. 81. That the judicial power of the Territory shall be vested in one Supreme Court, Circuit Courts, and in such inferior Courts as the Legislature may from time to time establish. And until the Legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the several Courts and their jurisdiction and

procedure shall continue in force except as herein otherwise provided." Section 81 of the Organic Act of the Territory of Hawaii.

The Organic Act of the Territory takes the place of a constitution as the fundamental law of the local government.

> Natonal Bank *vs.* County of Yankton, 101 U. S., 129, 133.

No Hawaiian law relating to the judiciary, whether previously existing or subsequently enacted, can stand if in conflict with the provisions of that act.

> 23 Ops. Atty. Gen., 539.

A clause like the one in question is an entire distribution of the judicial power and the legislature cannot vest any portion of it elsewhere.

> Cooley, Constitutional Limitations (7th Ed.), 129, Note 3.

An examination of the cases cited by Cooley shows a constant tendency of the legislature to vest judicial power in various State officers, from mayors to notaries public, which statutes are invariably declared void by the courts. Although the reasoning in these cases fully supports our contention, we confine our own citations to cases directly in point, that is, cases in which judicial power not incident or ancillary to any cause pending in the court has been conferred by statute upon circuit judges at Chambers.

California:

"The judicial power of the State shall be vested in the Senate sitting as a Court of Impeachment, in a

Supreme Court, Superior Courts, Justices of the Peace, and such inferior Courts as the Legislature may establish in any incorporated City or town or City and County." Article 6, Section 1, Constitution of California.

Under this provision of the Constitution a statute giving to a county judge power to decide questions of eminent domain and to assess damages in condemnation proceedings has been held to be unconstitutional.

"The question, therefore, arises whether under the constitution the Legislature has competent power to create a tribunal and confer upon it jurisdiction in special cases; for it is beyond question that the County Judge is not the County Court, and although the Legislature may authorize the Judges of the several courts to perform certain duties at Chambers in respect to proceedings in a cause yet some Court has jurisdiction of the cause, and the Judge in Chambers, whether of the same or another Court, acts as a Commissioner or in some other capacity merely in aid of and subordinate to the Court having jurisdiction of the cause. It being admitted beyond dispute that a County Judge is not a County Court, if jurisdicition of special cases could be conferred upon the County Judge, it is equally competent the Legislature to confer it upon the County Clerk, Recorder or Sheriff, or to create a new tribunal for the exercise of such jurisdiction. . . . It is our opinion that the Legislature is not authorized to provide for the exercise of such jurisdicition by any tribunal other than one of the Courts provided for by the constitution, and that a statute which grants such jurisdiction to a judicial officer cannot be upheld."

Spencer Creek Water Company *vs.* Vallejo, 48 Cal., 70.

Michigan:

"The judicial power is vested in one Supreme Court, in Circuit Courts, in Probate Courts, and in Justices of the Peace. Municipal Courts of Civil and Criminal jurisdiction may be established by the Legislature in Cities." Article 6, Section 1, Constitution of Michigan.

Under this provision an Act of the Legislature gave certain judicial powers to Circuit Judges at Chambers in connection with the distribution of an insolvent debtor's estate. This act was held unconstitutional.

"But the exercise of judicial power in its strict legal sense can be conferred only upon Courts named in the constitution. The judicial power referred to is the authority to hear and decide controversies and to make binding orders and judgments respecting them. . . . A statute which confers such judicial powers upon a Circuit Judge at Chambers is clearly in conflict of Article 6, Section 1 of the constitution."

Risser *vs.* Hoyt, 53 Mich., 185.

A later Michigan statute concerning Eminent Domain was also declared unconstitutional on the ground that it conferred judicial power upon Circuit Judges at Chambers.

"Under our constitution such powers as are strictly judicial in their character can only be vested in Circuit Courts which are named in the constitution itself. The Circuit Courts, as Courts, have such powers; the Judges, as Judges out of Court, do not possess them and cannot be vested with them."

Toledo Railway Company *vs.* Dunlap, 47 Mich., 456.

A further provision of the Michigan Constitution gives

the Legislature the right to vest in certain persons judicial powers not exceeding those of a Circuit Judge at Chambers. These persons, who are called "Circuit Court Commissioners," being thus placed by the constitution on exactly the same footing as a Circuit Judge at Chambers, cases relating to them are directly in point. A statute authorizing these Commissioners to issue writs of habeas corpus under which it became necessary to adjudicate the right to the custody of children was held to be unconstitutional, Judge Cooley delivering the opinion:

"The principal question in this case concerns the power of a Circuit Court Commissioner under habeas corpus to adjudicate on the right to the custody of children as between the parents. The constitution vests the judicial power in one Supreme Court, in Circuit Courts, in Probate Courts, and in Justices of the Peace, but allows Municipal Courts to be established in Cities; Article 6, Section 1. It also declares that 'The Legislature may provide by law for the election of one or more persons in each organized County who may be vested with judicial powers not exceeding those of a Circuit Judge at Chambers,' Article 6, Section 16. It is under this last section that the power in question is supposed to be authorized. . . . The Circuit Court seldom is called upon to exercise a more important authority, and if it can be transferred to a Commissioner as a mere Chamber duty it is not easy to see why any other power which that Court exercises may not be transferred to him also, by simply dispensing with the forms of trial prescribed for the attainment of justice and making the proceedings summary. We regard the case of Waldby *vs.* Calendar (8 Mich., 430) as governing this, and the proceeding must be quashed."

Rowe *vs.* Rowe, 28 Mich., 353.

Ohio:

"The judicial power of the State is vested in the Supreme Court, Circuit Courts, Courts of Common Pleas, Courts of Probate, Justices of the Peace, and such other Courts inferior to the Supreme Court as the General Assembly may from time to time establish."

Article 4, Section 1, Constitution of Ohio.

The same question arose in Ohio under a statute giving Judges at Chambers certain judicial powers under an eminent domain act and the statute was declared unconstitutional. The Court said:

"Now the provision of the constitution is that the several judges of this Court shall have and exercise such power and jurisdiction at Chambers as may be directed by law; and the question arises whether a capacity is thereby conferred on the members of this Court to receive at the hands of the Legislature a Chamber jurisdiction in causes pending in other courts of which the Judges of this Court are not members. We all concur in answering this question in the negative. Jurisdiction at Chambers is incidental to and grows out of the jurisdiction of the Court itself. It is the power to hear and determine out of Court such questions arising between the parties to a controversy as might well be determined by the Court itself but which the Legislature has seen fit to entrust to the judgment of a single Judge out of Court without requiring them to be brought before Court in actual session. It follows that the jurisdiction of a Judge at Chambers cannot go beyond the jurisdiction of the Court to which he belongs or extend to matters with which his Court has nothing to do. And the constitution in granting such jurisdiction at Chambers to the Judges of the several Courts of the State as may be directed by law is to be understood as limiting the jurisdiction of each to such subject matters as are within the jurisdic-

tion of his proper Court and to which it is *ex vi termini* limited."

Pittsburg, etc., Ry. Co., *vs.* Hurd, 17 Ohio State, 144-146.

Missouri:

"The judicial power of the State, as to matters of law and equity, except as in this Constitution otherwise provided, shall be vested in a Supreme Court, the St. Louis Court of Appeals, Circuit Courts, Criminal Courts, Probate Courts, County Courts and Municipal Corporation Courts." Article 6, Section 1, Constitution of Missouri.

Under this provision the question arose as to the validity of a statute giving Judges at Chambers certain judicial powers relative to the winding up of Building and Loan Associations and the decision was that the statute was unconstitutional.

"By our constitution the judicial power of the State, as to matters of law and equity, except as in the constitution itself otherwise provided, is vested in certain Courts therein named; (Const., Art. 6, Section 1). The word 'Court' is there used in its technical sense. A Court is a judicial assembly. The Judge of the Court is its presiding officer. While the Judge is often called "the Court" yet he is only so rightly called when the tribunal over which he presides is in session. Bouvier gives to the word 'Court' this definition, 'A body in the Government to which the administration of public justice is delegated. The presence of a sufficient number of the members of such a body regularly convened in an authorized place at an appointed time engaged in the full and regular performance of its functions.' . . . It is contended that our statutes confer on the Judge the authority to hear and determine the whole

issues in a case of this kind in vacation. If there is such a statute it is in violation of Section I, Article 6 of our constitution above quoted. In that section the constitution disposes of all the judicial power of the State in matters of law and equity, and it leaves nothing to be disposed of by the General Assembly. This is the view the Supreme Court of Michigan took of the same subject; that Court said 'By Article 6, Section 1 of our constitution the judicial power is vested in one Supreme Court, in Circuit Courts, in Probate Courts and in Justices of the Peace. . . . Section II of this Act confers upon the Judge in vacation the authority to hear and determine summarily upon the question of the insolvency of the debtor, the giving or attemping to give preferences, his refusal or neglect to make assignment of his property and his orders and judgment (if he makes any) are final and conclusive. . . . A statute which confers such judicial powers upon a Circuit Judge at Chambers is clearly in conflict with Article 6, Section I of the constitution,' Risser *vs.* Hoyt, 53 Mich., 185."

State *vs.* Woodson, 161 Mo., 444, 453-455.

It will thus be seen that the Courts are unanimous in holding that under constitutional provisions similar to our Organic Act the word "Court" does not include a Judge at Chambers, and that it is not competent for the legislature to vest in Judges at Chambers any judicial power not incident or ancillary to some cause pending in a Court.

B. Other statutes in which the word "Court" is held not to include Circuit Judges.

There are many many other statutes in which the word "Court" is held to be not synonymous with "Judge." Reference to these may be found in,

8 Ency. of Law, Second Edition, 23.

With the above cases directly in point, however, it is hardly necessary to go exhaustively into these cases, however close the analogy may be between the statutes there construed and the statute in question. We wish to call particular attention, however, to a United States Supreme Court case. Under the writ of error statute (Revised Statutes, Section 709), a writ of error will go from the Supreme Court of the United States to the final judgment of the highest Court of the State in which a decision in the suit can be had. It would seem important that a writ of error should go under this statute to a Judge at Chambers, provided he was the highest tribunal of the State which could give judgment in any particular case, but the Supreme Court has decided that the word "Court" in the statute cannot be held to include a Judge at Chambers.

McKnight *vs.* James, 155 U. S., 685.

C. Principles on which other cases may be distinguished.

Neither of two Courts which have rendered adverse decisions in this matter has found a single case in point *contra* to those above cited. Some cases were cited by counsel in the Territorial Courts, but they are readily distinguishable upon one or more of the following grounds:

First. That a case may be in point, the constitution of the State must have a clause distributing the judicial power substantially in the language of Section 81 of our Organic Act.

For example: The Constitution of New York has no such clause, while the Constitution of Nebraska expressly includes Circuit Judges at Chambers as proper depositories of judicial power.

Second. The question involved must be a constitutional one. The discussion as to whether or not certain powers are vested in Circuit Judges at Chambers under

particular statutes of the several States has no value in this discussion. In Hawaii it is admitted that so far as the statute goes the judicial power in cases of Equity and Probate is so vested, but the question is as to the conflict of those statutes with the Organic Act.

Third. The power conferred upon Circuit Judges at Chambers by the legislature must be part of the judicial power.

Questions of contested elections or questions as to the adoption of children are not questions included in the term "judicial power" and may be vested by the legislature in any tribunal it pleases. In an Oregon case cited in the Court below, the question of counting votes in a contested election was vested in a Court composed of a County Clerk and two Justices of the Peace. In most States the legislature retains this question in its own hands, so far as its own members are concerned. Not being a judicial question it can delegate it to any tribunal it choses.

Fourth. Judicial power which is incident or ancillary to a case pending in some Court having jurisdiction thereof can be vested to a certain extent in Circuit Judges at Chambers. This is, perhaps, the most difficult class of cases to distinguish at first sight, although the difference is clear and fundamental. Circuit Judges at Chambers may be vested with power to issue preliminary writs, injunctions, appoint receivers, and other very important matters connected with the case, provided the final determination of the issues comes up in a Court which has jurisdiction of the case.

A rough test as to whether the statute construed in any given case has been or may be defended upon this ground is to be found by ascertaining whether the case reaches the Supreme Court of the State by appeal or

exceptions from some *Court*. If it does it shows that there is a Court having jurisdicition of the cause and which probably entered the final judgment or order so that the previous decisions of the Circuit Judges at Chambers were merely preliminary or incidental.

It is true that even in this class of cases the legislature may go too far and while preserving the form of a Court, actually give to the Judges at Chambers the final determination of vital issues, in which cases the Courts have not hesitated to declare the statutes unconstitutional.

The statutes of Hawaii, however, do not even pretend to invest jurisdicition in Equity or Probate in any Court. An appeal is taken direct from the decision of the Circuit Judge and the Circuit Court has no control over the case at any stage of the proceedings. If it is remanded it is remanded to the Circuit Judge and not to the Circuit Court. We unhesitatingly affirm that no statute of this kind arising under a similar constitutional provision has ever been held valid in any other jurisdiction.

D. Discussion of the decision of the Hawaiian Supreme Court.

The decision of the Hawaiian Supreme Court states that "the cases cited contain reasoning of great force in the support of the petitioners' contention" (Transcript, page 22.), but reaches the conclusion that there is something different or peculiar in the status of Hawaii with relation to its past judicial history which warrants the Court in refusing to apply this reasoning. This course

of argument necessitates a brief review of Hawaiian judicial history.

The Constitution of Kamehameha III, 1840;
The Constitution of Kamehameha III, 1852;
The Constitution of Kamehameha V, 1864;
The Constitution of Kalakana, 1887; and
The Constitution of the Republic, 1894.

These are published under the title "The Fundamental Law of Hawaii." The Constitution of Kalakana, 1887, can also be found in 5 Haw., 703; and the Constitution of the Republic, 1894, in 9 Haw., 732.

A fairly comprehensive view of the judiciary can be obtained by looking through the prefaces of the successive Hawaiian Reports. Previous to January 1, 1893, the Supreme Court justices tried cases at *nisi prius* and the same judges set *in banco* upon appeal. By the Judiciary Act of 1892, a portion of which has been quoted, the Supreme Court became purely an Appellate Court and *nisi prius* jurisdiction at law and in equity was distributed between the newly created Circuit Courts and Circuit Judges at Chambers.

See 8 Haw. preface,

Estate of Kealiiahonui, 9 Haw., 675.

Volumes 1 and 2 Hawaiian Reports, comprising the period 1847 and 1865, contain not only the decisions of the Supreme Court *in banco* on appeal but also those of single judges not appealed from.

Volumes 3, 4, 5 and 7 contain only decisions of the Supreme Court. Volume 6 contains the decision of Supreme Court judges at Chambers not appealed from, from 1866 to 1889. Volumes 9 to 12 inclusive contain the reports of the Supreme Court under the new judicial system, in

which the Supreme Court is purely appellate. Volumes 13 to 15 inclusive include decisions of the Territorial Supreme Court since annexation.

The principal arguments of the Territorial Supreme Court are:

(1) That Circuit Judges at Chambers may be regarded as Courts.

(2) That weight should be given to long-continued, unquestioned and contemporaneous construction.

(3) That Section 81 of the Organic Act being borrowed from the Constitution of the Republic, the construction placed upon it previously may be considered.

(4) That repeals by implication are not favored.

These will now be considered.

(1) The proposition that a Circuit Judge at Chambers may be regarded as a Court finds no support among the authorities. As shown in the cases cited above, the term "Judge at Chambers" has a definite and well recognized meaning. No statute in Hawaii makes a Court out of a Circuit Judge at Chambers. Taking but one instance from the many essentials of a Court, there is no statute regulating service of process from Circuit Judges at Chambers nor designating the time in which a defendant must answer. In the Courts of Record this matter is covered by statute and the time fixed at twenty days.

Civil Laws of 1897, Section 1217; Section 1238.

At Chambers the subject was formerly covered by a rule of Court reading:

"The time for answering shall be ten days after service, if the defendant resides on the Island of Oahu, and twenty days after service if made on either of the other islands."

9 Haw., 721.

Since the establishment of the Territorial Courts no rule has been established by the Circuit Judges at Chambers and the practice is not uniform. The original summons in the present action fixed a day certain, reading as follows:

"You are commanded to summon A. W. Carter, Annie Thelma K. Parker and Elizabeth J. Knight to appear on the 28th day of June A. D. 1904, before the Honorable George D. Gear, Second Judge at 10 o'clock A. M. of said day in the court-room at Honolulu, to answer the annexed motion, at which time the same is set down for hearing."

This clearly shows that the Circuit Judges at Chambers proceed summarily and have never been considered to be Courts of Record within Chapter 86 of the Civil Laws of 1897.

The Territorial Supreme Court says on this subject:

"Much, as to jurisdicition and procedure, is governed by what may be considered Hawaiian common law—that has grown up without the aid of statute or has been built upon statutes by inference and been recognized by bench and bar and has to some extent been assumed in the enactment of statutes. In fact, the judiciary has developed here, especially in its earlier period, much as it did in early English history, gradually and largely without the aid of statute."

(Transcript, page 25.)

Even at Common Law it is generally assumed that there must be a general grant of jurisdicition.

11 Cyc., 661.

A duly organized Court may perhaps contrive to enlarge its jurisdicition by a gradual assumption of power, but to argue that Circuit Judges at Chambers

can make themselves into Courts by assuming to be Courts seems to imply that they can lift themselves by their own judicial bootstraps.

(2) We submit that there has been no long continued, unquestioned and contemporaneous construction of Section 81 of the Organic Act. The judicial system prior to January 1, 1893, when the Supreme Court Justices sat at *nisi prius*, was so different from the present system that no comparisons can be drawn from it. It is true that there was a similar provision in the Constitutions of 1852, 1864 and 1887, and it is also true that during this period the Supreme Court justices at Chambers exercised full equity and probate jurisdiction. These Constitutions, however, contained the following identical provision:

"The Chief Justice of the Supreme Court shall be the Chancellor of the Kingdom; he shall be *ex officio* President of the House of Nobles in all cases of impeachment, unless when impeached himself; and exercise such jurisdicition in equity or other cases as the law may confer upon him; his decisions being subject, however, to the revision of the Supreme Court on appeal."

Constitution 1852, Article 86.
Constitution 1864, Article 68.
Constitution 1887, Article 68.

It is manifest that the questions arising under this judicial system and under these constitutional provisions are very different from the question now before the Court and its decision could in no manner affect this period.

Since 1893 Circuit Judges at Chambers have exercised full equity and probate jurisdicition under a constitutional provision in many respects similar to Section 81 of the Organic Act, but there was no contem-

poraneous construction of this section. The plain truth is that the question was overlooked and never raised for the seven years the Constitution remained in force. Contemporaneous construction is undoubtedly of weight, but this does not mean that if a power exists unchallenged upon constitutional grounds for seven or even ten years, any prescription will run in its favor.

This whole matter reduces itself to an argument *ab inconvenienti*. While the decision of this Court would directly affect only transactions since 1900, it is felt that the same principle would be applied to all decisions since 1893. As to the weight which should be given to such an argument we merely refer to the history of the Probate Court of Utah. This Court, under the statutes of Utah, exercised jurisdiction, including divorce jurisdiction, from 1855 to 1874 when the Supreme Court of the United States in a case far less clear than the case at bar, decided the entire statute void.

Ferris *vs.* Higley, 20 Wall., 375.

(3) As to the argument that the provision of the Organic Act in question is borrowed from the Constitution of the Republic of Hawaii the Territorial Supreme Court says "It is also a general rule of construction that when one State borrows a law from another State, it also borrows the construction previously put upon it by the first State" (Transcript, page 23).

Even if we assume the major premise, that the section in question, which is similar to the constitutional provisions of many of the States of the Union, must be referred solely to the similar provision in the Constitution of the Republic of Hawaii, the minor premise is still unsound. *There has been no construction previously put*

upon the section by the Courts of the Republic of Hawaii. It is a manifest perversion of the principle above quoted to apply it to the present case. The principle would have to be revised to read:

"If a statute is passed by one State and its constitutionality remains unquestioned for seven years, such constitutionality cannot be attacked in any other State which borrows the same statute and constitutional provision." This is a manifest absurdity.

(4) "*Repeals by implication are not favored.*" This principle is usually applied to acts of successive legislatures. It has no application to an Act of Congress which stands in the relation of Constitution to the enactments of the Territorial Legislature. The Organic Act passed in 1900 cannot be said in any sense to "repeal" a subsequent Act of the Territorial Legislature as, for example, that portion of Act 16 of the Laws of 1903 conferring for the first time divorce jurisdiction upon Circuit Judges at Chambers. Yet this jurisdiction is undoubtedly void, because, having been previously vested in the Circuit Courts (Civil Laws 1897, Section 1144), it has not the advantage of the "contemporaneous construction" or "previous history" which are supposed to take Equity and Probate jurisdiction out of the usual rule. The question is not one of "repeal" but of testing the validity of a statute by the ordinary principles of Constitutional Law. We submit that under these principles the reasoning of the cases cited is decisive, and the statutes void.

Respectfully submitted,

JOSEPH J. DARLINGTON,
WM. F. MATTINGLY,
Attorneys for Plaintiffs in Error.

Supreme Court of the United States

October Term, 1908

No. 848

ALFRED W. CARTER, GUARDIAN OF THE PROPERTY OF ANNIE T. K. PARKER, A MINOR, PLAINTIFF IN ERROR,

vs.

GEORGE D. GEAR, SECOND JUDGE OF THE CIRCUIT COURT OF THE FIRST CIRCUIT, TERRITORY OF HAWAII, ET AL.

In Error to the Supreme Court of the Territory of Hawaii.

Supplemental Brief for Plaintiff in Error.

JOSEPH J. DARLINGTON,
WM. F. MATTINGLY,
Attorneys for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 442.

ALFRED W. CARTER, GUARDIAN OF THE PROPERTY OF ANNIE T. K. PARKER, A MINOR, PLAINTIFF IN ERROR,

vs.

GEORGE D. GEAR, SECOND JUDGE OF THE CIRCUIT COURT OF THE FIRST CIRCUIT, TERRITORY OF HAWAII, ET AL.

In Error to the Supreme Court of the Territory of Hawaii.

Supplemental Brief for Plaintiff in Error.

On Motion to Dismiss or Affirm.

The sole object of the petition (Rec. pp. 2, 4) was for a writ of prohibition.

The decree of the Supreme Court of the Territory of Hawaii (Rec. p. 31), to which this writ of error was sued out, dismissed the temporary writ which had been issued and denied the petition for the permanent writ of prohibition. That decree was manifestly final.

The petition for the writ of prohibition was based upon averments that Judge Gear had taken jurisdiction of the

cause (for the removal of the guardian), under and by virtue of certain statutes of the Territory; that said statutes and each of them and all statutes of the Territory purporting to confer judicial power and authority upon circuit judges at chambers to hear and determine judicial matters, not incident or ancillary to any cause pending in some court, are and each of them is null and void, being in conflict with Article III, section 1, of the Constitution of the United States, providing that:

> "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish;"

and (sec. 8, R. 3), are also in conflict with section 81 of an act of Congress entitled "An act to provide a government for the Territory of Hawaii," approved April 30, 1900, viz:

> "Section 81. That the judicial power of the Territory shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish."

Section 86 of this same organic act of the Territory provides that "The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii."

That a Federal question was involved and this court has jurisdiction, see—

> Equitable Life Ins. Co. *vs.* Brown, 187 U. S. 308.
> Hawaii *vs.* Mankichi, 190 U. S. 197, 215.

The case for the removal of the guardian, instituted in July, 1904 (Rec. pp. 5, 13), was not a proceeding then

pending within the exception of the organic act of 1900 that, "other proceedings then pending in the courts of the republic of Hawaii shall be carried on to final judgment and execution in the corresponding courts of the Territory of Hawaii." The guardian had been appointed in September, 1899, and no proceeding was pending in 1900 to be carried on to final judgment and execution.

In the first place, the matter of the guardianship was pending only in the sense that the guardian filed his annual accounts each year. These proceedings for the removal of the guardian are a new and distinct matter, and the first paper therein was filed June 7, 1904.

Second. The matter is no longer in probate. The circuit judges, at chambers, have a general grant of jurisdiction under the statute and no distinction is drawn between equity and probate, although those headings frequently appear in the papers. Under chapter 29 of the Civil Code of 1859 (quoted in our brief, p. 11), the word probate was used and therefore the matter of guardianship is claimed to be pending in probate at the time the organic act went into effect. But act 16 of the laws of 1903 (also in our brief, p. 25, sec. 6, p. 26) went through this chapter and carefully struck out the words "probate" and "court" wherever they occurred, thereby leaving the jurisdiction, if valid at all, where it would be at common law; that is to say, in chancery or equity.

That jurisdiction over guardians and wards is a chancery jurisdiction, see—

Eyre *vs.* Shaftesbury, 2 P. Wms. 103, 119.
2 Eq. Cas. ab. 754.
9 Ency. Pl. & Pr. 891.

It is manifest that in the case below for the removal of the guardian there was no plain, speedy, and adequate remedy by appeal. The jurisdiction of the judge to enter upon a long, expensive, and tedious investigation was de-

nied, and the proper remedy was to seek prohibition from the superior court.

We submit that no argument is required to show that under R. S., sec. 709, a final judgment in the case sought to be prohibited is essential or necessary before the writ of prohibition will issue. Otherwise, in many cases, the mischief would be done which it is the object of the writ to prevent.

Respectfully submitted.

JOSEPH J. DARLINGTON,
WM. F. MATTINGLY,
Attorneys for Plaintiff in Error.

FILED
FEB 17 1905
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 442.

ALFRED W. CARTER, GUARDIAN OF THE PROPERTY OF ANNIE T. K. PARKER, A MINOR, PLAINTIFF IN ERROR,

vs.

GEORGE D. GEAR, SECOND JUDGE OF THE CIRCUIT COURT OF THE FIRST CIRCUIT, TERRITORY OF HAWAII, AND JOHN S. LOW, NEXT FRIEND OF ANNIE T. K. PARKER, A MINOR.

MOTIONS TO DISMISS OR AFFIRM AND BRIEF ON BEHALF OF THE DEFENDANTS IN ERROR.

JOHN S. LOW,
Guardian ad Litem and Next Friend of Annie T. K. Parker, a Minor.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 14859

(19,542.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1904.

No. 442.

ALFRED W. CARTER, GUARDIAN OF THE PROPERTY OF ANNIE T. K. PARKER, A MINOR, PLAINTIFF IN ERROR,

vs.

HONORABLE GEORGE D. GEAR, SECOND JUDGE OF THE CIRCUIT COURT OF FIRST CIRCUIT, TERRITORY OF HAWAII, AT CHAMBERS, AND JOHN S. LOW, NEXT FRIEND OF ANNIE T. K. PARKER, A MINOR, DEFENDANTS IN ERROR.

MOTIONS TO DISMISS OR AFFIRM.

And now come defendants in error and move this court to dismiss the writ of error herein, and to confirm the decree entered in the supreme court of the Territory of Hawaii on the 7th day of November, 1904, dismissing plaintiff's petition for writ of prohibition.

Defendants in error base this motion upon the ground that the decree dismissing petition for writ of prohibition was not such a final judgment or decree in a suit in the highest court of the Territory of Hawaii in which a decision in the suit could be had, where is drawn in question the validity of a statute of or an authority exercised under any State, on the ground of the statute being repugnant to the

Constitution, treaties, or laws of the United States, in which the decision is in favor of the validity of such statute.

Dated Honolulu, January 31, 1905.

J. S. Low,
Guardian ad Litem and Next Friend
of Annie T. K. Parker.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, A. D. 1904.

ALFRED W. CARTER, *Guardian of the Property of Annie T. K. Parker, a Minor, Plaintiff in Error,*
vs.
Honorable GEORGE D. GEAR, *Second Judge of the Circuit Court of First Circuit, Territory of Hawaii, at Chambers, and* JOHN S. LOW, *Next Friend of Annie T. K. Parker, a Minor, Defendants in Error.* } No. 442.

BRIEF ON BEHALF OF DEFENDANTS IN ERROR.

DEFINITIONS.

"Hawaii" means *Kingdom of Hawaii, Republic of Hawaii,* and *Territory of Hawaii,* according to the context.

"Civil laws" means the *laws of the Republic of Hawaii compiled by Sydney M. Ballou.*

"Supreme court" means *supreme court of the Kingdom, Republic, and Territory of Hawaii* according to the context.

"Circuit court" means *circuit court of one of the judicial circuits of Hawaii, as established in 1892 in chapter 57,* being "An act to reorganize the judiciary department." (See section 1135, Civil Laws.) Prior to this act the three judges of the supreme court sat as trial judges at *nisi prius* in the different circuits, and sat *in banco* on matters brought before them on appeal, bills of exception and other writs. (See sections 815 to 846 of the Civil Code of the Hawaiian Islands passed

in the Year of our Lord 1859.) Hence there were practically only two judges of the supreme court to decide causes, as every cause that came before the court *in banco* was from a decision or ruling of one of the three. The act of 1892 changed this, making the supreme court a court of appellate jurisdiction only (see section 1164 of the Civil Laws), and provided for circuit judges.

This will explain many inconsistencies apparent in the Civil Laws, and more especially sections 1497 and 1498, which have been amended by implication.

THE FACTS.

A guardian was first appointed of the estate of Annie T. K. Parker, a minor, referred to in the title hereof, in the circuit court of the first circuit, on the 13th day of October, 1894, by W. A. Whiting, first judge of that court, which guardian afterwards resigned, and on the 25th day of September, A. D. 1899, the above-named petitioner, A. W. Carter, plaintiff in error, was appointed guardian of said minor by W. L. Stanley, second judge of said court, and duly qualified. Special attention is called to this last-mentioned date for the reason that the act to provide a government for the Territory of Hawaii, passed by the Fifty-sixth Congress of the United States of America on the 27th day of April, was approved on the 30th day of April, A. D. 1900, or seven months after the appointment of Carter, which made the estate a pending matter when the organic act was passed. From the time of his appointment up to the 8th day of June, A. D. 1904, when said minor, through J. S. Low, her guardian *ad litem* and next friend, one of the defendants in error, filed the application for his removal, said Carter acted as such guardian, filing accounts regularly in the circuit court of the first circuit.

After many preliminary pleas, including demurrer and motion, upon the case being set for hearing by George D. Gear, second judge of said circuit court, the question of his jurisdiction under the organic act to hear said cause was for the first time raised by motion duly filed by the plaintiff in error; which motion was overruled. The writ of prohibition herein was then sued out of the supreme court, the highest court of the Territory, on the 7th day of September, 1904. Hearing was had thereon, and on the 7th day of November, 1904, the court handed down its decision dismissing the petition. A decree to that effect was signed on the 8th day of November, 1904, from which decree plaintiff in error sued out the writ of error herein.

The attention of the court is called to the fact that, though the petition for the writ of prohibition is based upon several grounds, among which the ground set forth in paragraph seven is that the statutes of the Territory of Hawaii purporting to confer judicial power and authority upon circuit judges at chambers conflict with article 3, section 1, of the Constitution of the United States, the only question raised on the writ of error is that the statutes of the Territory of Hawaii purporting to confer upon judges of the several circuit courts at chambers jurisdiction to hear and determine an application for the removal of a guardian are inconsistent and in conflict with the organic act—in other words, that no constitutional question is raised in the writ of error. In fact, the first and third specifications of error ought not to be considered at all, for the reason that it is immaterial that the court held that the statutes of the Territory of Hawaii purporting to confer upon the judges of the several circuit courts at chambers judicial power not incident or ancillary to some cause pending before a court were not in conflict with and in violation of section 81 of the organic act. It is entirely sufficient if the organic act confers such power anywhere within its four corners.

It may also be observed that the second specification of

error is based upon a repeal of the statutes of the Territory of Hawaii, without particular reference to the statutes alleged to be repealed, and to which no specific reference was made in the petition for the writ of prohibition.

The third specification of error is a mere general conclusion as to the correctness of the decision of the supreme court, without pointing out in any manner wherein the court erred. If we are allowed to guess at the meaning of the petitioner, we can impute to him the intention of saying that the organic act repeals by implication all laws of the Territory of Hawaii conferring jurisdiction on judges at chambers in matters of equity and probate. If the court will indulge in this guess, it becomes necessary to understand what is meant by the expressions contained in the statutes conferring jurisdiction in equity and probate, found in the Civil Laws in sections 1145–1148–1497–1498 and 1499.

QUESTIONS OF LAW.

The several questions of law may be presented under two separate heads:

First. DOES A WRIT OF ERROR LIE IN THIS MATTER?

Second. DID THE SUPREME COURT ERR IN DISMISSING THE PETITION OF PLAINTIFF IN ERROR?

Under the first head it is submitted that writ of error does not lie for two reasons:

First Reason: That the decision on the writ of prohibition was not a final decision as contemplated by section 709 of United States Compiled Statutes.

Second Reason: That there is no Federal question involved under said section 709.

Under the first reason the court will observe that the writ of prohibition was to prevent the hearing by Judge Gear of the application to remove the guardian, a matter properly before him in accordance with the laws of the Territory of Hawaii (the organic act excluded), and from a final judgment in which matter an appeal would lie to the supreme court.

"Prohibition cannot be resorted to where there is a plain, speedy and adequate remedy by appeal."

Balentine *v.* Police Court of City and County of San Francisco, 75 Pac. Rep., 336.
In re Gates, 94 N. W. Rep., 292.
People *v.* District Ct. of Second Judicial District, 77 Pac. Rep., 239.
State *ex rel.* Port Orchard, &c., *v.* Supr. Ct. Kitsap County, 71 Pac. Rep., 1100.
State *ex rel.* Stetson, &c., *v.* Supr. Ct. King County, 73 Pac. Rep., 479.
16 Ency. Pl. & Pr., 1118.
2 Spelling Inj. and Ex. Rem., sec. 1729, page 1488.
In re Rice, 155 U. S., 396.
Re Huguley Manfg. Co., 184 U. S., 297.
Decatur *v.* Paulding, 14 Peters, 599–612.
Western *v.* Charleston, 2 Peters, 449.
Knight *v.* Kahnhiser Bros. *et al.*, 44 S. E. Rep., 778.
State *ex rel.* Jaubert Bros. *v.* Leche, 36 So. Rep., 868.

A cogent reason for this rule is that the issuance of the writ of prohibition is not demandable as a matter of right but is of sound judicial discretion.

16 Am. & Eng. Ency. of Law, 1109.

And an order denying the writ is not revisable.

People *v.* Westbrook, 89 N. Y., 152.
People *v.* McCue, 76 N. Y. Sup., 485.
State *ex rel.* Pulliam *v.* Fort, 81 S. W. Rep., 476.
People *v.* Dist. Ct. of Second Judicial District, 77 Pac. Rep., 239.

Section 709, U. S. Compiled Statutes, requires that there shall be a final judgment. There has been no final judgment in the matter of the application for the removal of A. W. Carter.

"The writ of error at common law is applicable only where the judgment to which it is sued out has the character of finality. All the books show that final judgment must be first rendered before the cause can be carried into a superior tribunal by writ of error."

"When the highest court of a State upon the first appeal decides a Federal question against the appellant and remands the case to an inferior court, not merely to carry the judgment into execution, but for further proceedings according to law, and upon further hearing the inferior court renders final judgment against him, he cannot have that judgment reviewed by the supreme court by writ of error, without first appealing from it to the highest court of the State, or at least where such is the practice, presenting a petition to that court for leave to appeal."

Fisher *v.* Perkins, 122 U. S., 522.

Great Western Tel. Co. *v.* Burnham, 162 U. S., 339.

For the foregoing citations see 4 Federal Statutes Annotated, 469, in which it is also said:

"A proceeding for a writ of prohibition to restrain a municipal corporation from carrying an ordinance into effect is a suit within the meaning of this section."

Western *v.* Charlston, 2 Peters, 449.

This last case is incorrectly relied upon by plaintiff in error to sustain his contention that a decision on a writ of prohibition is a final decision. While the decision literally so holds, it will be observed that the writ of prohibition was not to restrain a suit pending before the court, and in that respect the decision was final. While the decision has been very severely criticised, and it may be doubted if it will be considered good law at this time, it does not apply to this case.

See also 7 Ency. Pl. and Pr., 832-'3-842.

"A certiorari may remove the record in any stage of the proceedings at the discretion of the court. Error is of right and lies only after final judgment."

Drowne *v.* Stevinson, 2 Mass., 441.
4 Ency. Pl. and Pr., 1.
7 Ency. Pl. and Pr., 820

It cannot be contended that the decree dismissing the petition for a writ of prohibition is a final decree. If it were final, as many writs of prohibition could be obtained as there could be Federal questions raised. Writs of prohibition could be sued out in all stages of the case. If a writ of error should lie from the denial of a writ of prohibition, the trial of the case on its merits could be deferred until a decision should be rendered on each writ in this court. If this court should sustain the decision of the territorial supreme court dismissing the writ, the case would be sent back to the circuit court for further proceedings. A new writ of prohibition could then be applied for on some other question, and the same process gone through with as on the first. It is therefore easily seen that not only could a trial be delayed indefinitely, but the expenses of litigation could be made so burdensome that only the rich man would in every case prevail.

See Chesapeake & Ohio Railway Co. *v.* E. A. White, adm'r, 111 U. S., 134.

Under the second reason the validity of a State statute must be drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision must be in favor of the validity of such statute.

Here again it will be observed that there are two prerequisites to permit this writ of error:

First. That the validity of a statute of the Territory of Hawaii must be drawn in question.

4 Fed. Stat. An., 470.

Second. The decision must be in favor of the validity of such statute.

4 Fed. Stat. An., 470.

First Prerequisite: While section 709 of the United States Compiled Statutes applies to State courts, section 86 of the organic act provides that "the laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii."

It is difficult to see how it can be contended that any decision of the territorial supreme court has been rendered in this matter affecting the validity or invalidity of any statute of the Territory of Hawaii. The most that can be said is that all laws of the Territory of Hawaii with reference to the jurisdiction of circuit judges at chambers were repealed—not directly, but by implication—by the organic act. In other words, it says the organic act is valid.

By section 6 of the organic act it is provided "that the laws of Hawaii not inconsistent with the Constitution or laws of the United States, or the provisions of this act, shall continue in force, subject to repeal or amendment by the legislature of the Territory of Hawaii or the Congress of the United States."

The statute referred to in section 709, United States Compiled Laws, is a statute, it is submitted, passed subsequent to some act of Congress, and not one that existed prior to some act of Congress with which that act was in conflict. In the latter case the act of Congress would be in conflict with a prior State statute. There could be no question as to the validity of the State statute. It would be purely a question of construction as to whether or not the State statute had been repealed, and would have to be construed the same as any other question of construction.

"A decision of the State court resting upon the construction and not the validity of a statute of the State, does not present a Federal question."

4 Fed. Stat. An., 473, and cases cited.

If a mere question of the construction of the organic act could be brought to this Supreme Court, a Federal question could be raised in nearly every case arising in the territorial courts.

Section 6, continuing the laws of the Territory of Hawaii in force, is equivalent to making those laws a part of the organic act. It is well settled that prohibition cannot issue from the United States Supreme Court where there is no appellate power given by law or any special authority to issue the writ.

Ex parte Gordon, 66 U. S., 503.

16 Ency. Pl. & Pr., 1101, note 1, and 1102.

Second Prerequisite: A decision of the territorial supreme court in this matter is not in favor of the validity of the State statute. It says in effect that the organic act provides a court for the hearing of the application for the removal of the guardian. It does not attempt to say that the territorial statute as such is valid or invalid. The question of the validity of the territorial statute is not raised.

Under the second head, did the supreme court of the Territory of Hawaii err in dismissing the petition of plaintiff in error, the discussion takes a double aspect:

First. A CONSIDERATION OF THE LAWS OF THE TERRITORY OF HAWAII, and

Second. A CONSIDERATION OF THE ORGANIC ACT.

CONSIDERATION OF THE LAWS OF THE TERRITORY OF HAWAII.

The sections of the civil laws heretofore referred to provide:

Section 1145 as amended by Laws of 1903:

"The judges of the several circuit courts shall have power at chambers within their respective jurisdictions, but subject to appeal to the circuit and supreme courts according to law as follows:

"*First.* To hear and determine all matters in equity.

"*Second.* To hear and determine all matters of divorce, separation and annulment of marriage.

"*Third.* To grant probate of wills, to appoint administrators and guardians, and to compel executors, administrators and guardians to perform their respective trusts, and to account in all respects for the discharge of their official duties; to remove any executor, administrator or guardian; to determine the heirs-at-law of deceased persons and to decree the distribution of intestate estates."

In other subsections additional powers are given which it is unnecessary to refer to.

"SEC. 1148. Matters in the jurisdiction of judges of the circuit courts in chambers, as set forth in section 1145, shall be determined by the judge having jurisdiction thereof, without the intervention of a jury, except as provided in the seventh division of said section 1145."

"SEC. 1497. In addition to the jurisdiction in equity otherwise conferred, the supreme court and the several justices thereof and also the several circuit courts shall have original and exclusive jurisdiction of every original process whether by bill, writ, petition or otherwise, in which relief in equity is prayed for, except when a different provision is made, and may issue all general and special writs and processes, required in proceedings in equity to courts of inferior jurisdiction, corporations and individuals when necessary to secure justice and equity."

"SEC. 1498. The supreme court and the several justices thereof, and also the several circuit courts, may hear and de-

termine in equity, all cases hereinafter mentioned, when the parties have not a plain, adequate and complete remedy at the common law, that is to say: * * *"

"SEC. 1499. Cases in equity may be commenced by bill or petition with a writ of subpœna according to the usual course of proceedings in equity, or inserted in an original writ of summons, or of summons and attachment, or by declaration in an action of contract, or tort, as the case may be, with or without an order for the attachment of the property or arrest of the defendant, and shall be returnable at the terms of the court or on the rule days established by the court.

"The material facts and circumstances relied on shall be stated with brevity, omitting immaterial and irrelevant matters."

"SEC. 1515. Matters of probate and of administration shall be heard and determined by the judge or court having jurisdiction thereof, without the intervention of a jury."

What the court must determine is whether or not Judge Gear, sitting at chambers, was holding court regularly, and under the statute of the Territory of Hawaii in the matter of the application to remove Alfred W. Carter, guardian of Annie T. K. Parker.

Opposing counsel attempt to make a point out of the amendments contained in Session Laws of the Republic of Hawaii of 1898, act 56, page 107, and of the Session Laws of the Territory of Hawaii of 1903, act 16, page 17, and act 32, page 198. The answer, however, is, in the first place, that these amendments are entirely consistent with the organic act, and in the next place, if they are not, they do not affect these proceedings in any way, for the application for the removal of Carter is equally consistent with the statutes and with the amendments, but if the amendments should be held to be invalid it would not in any way affect the application for removal. They also try to make capital out of the endorsement on the back of the covers of the pleadings and papers filed in the removal proceedings. It is submitted that it is beneath the dignity of the court to listen to legal quibbles.

The language used is perfectly plain. The court will not concern itself about the form of entitling any pleading in the matter of the removal of Carter or the clerk's filing certificate thereon so long as it can be gathered from the pleading itself in which court and in which cause it was intended to be filed. It will not permit a person to suffer because a clerk not knowing his duties files a document with an incomplete filing certificate. All the pleadings filed in the removal matter show without any shadow of a doubt that they were entitled and filed in the court of the first judicial circuit, having jurisdiction under the statute to hear and determine matters of probate, and were duly considered by Judge Gear. To say that the endorsement or filing mark on a paper would affect the contents would be as trivial as to say that the color of paint on an ocean steamer could affect in any way its tonnage or strength.

In the constitution granted by His Majesty Kamehameha III, King of the Hawaiian Islands, June 14, 1852, found in the Session Laws of 1860, article 84 reads:

"The judicial power shall extend to all cases, in law and equity, arising under the constitution, any law of this kingdom, and treaties made, or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls, and to all cases of admiralty and maritime jurisdiction."

Article 85 reads:

"The judicial power shall be divided among the supreme court and the several inferior courts of the kingdom, in such manner as the legislature may from time to time indicate."

In the constitution granted by His Majesty Kamehameha V on the 20th day of August, 1864, found in the Session Laws of 1864–'5, are the following articles:

"Article 64. The judicial power of the kingdom shall be vested in one supreme court, and in such inferior courts as the legislature may, from time to time, establish."

'Article 66. The judicial power shall be divided among the supreme court and the several inferior courts of the kingdom, in such manner as the legislature may, from time to time, prescribe, and the tenure of office in the inferior courts of the kingdom shall be such as may be defined by the law creating them.

"Article 67. The judicial power shall extend to all cases in law and equity arising under the constitution and laws of this kingdom, and treaties made, or which shall be made under their authority, to all cases affecting public ministers and consuls, and to all cases of admiralty and maritime jurisdiction."

In the constitution granted by His Majesty Kalakaua on July 6 and promulgated July 7, 1887, and found in the Session Laws of 1886, are the following articles:

"Article 64. The judicial power of the kingdom shall be vested in one supreme court, and in such inferior courts as the legislature may, from time to time, establish."

"Article 66. The judicial power shall be divided among the supreme court and the several inferior courts of the kingdom, in such manner as the legislature may, from time to time, prescribe, and the tenure of office in the inferior courts of the kingdom shall be such as may be defined by the law creating them."

Under article two of the constitution of the Republic of Hawaii, promulgated on the 3d day of July, 1894, it is provided that "the judicial power of the Republic shall be vested in one supreme court and in such inferior courts as the legislature may, from time to time, establish."

The act to reorganize the judiciary was passed in 1892, and if we read the act literally the only court that ever existed in the Republic of Hawaii after the promulgation of the constitution was the supreme court, for no inferior court was thereafter ever created by the legislature. In fact, no court in equity or probate ever existed if the contention of opposing counsel is correct, for from the very earliest times

the laws conferred such jurisdiction upon "judges at chambers," and not upon "courts."

In section 1136 of the Civil Laws it is provided that "there "shall be established in each of the judicial circuits in the "Hawaiian islands a court, with the powers and under the "conditions hereinafter set forth, which shall be styled the "circuit court of such circuit, as, for instance, the circuit "court of the third circuit." Attention is called to the fact that there are no courts of the circuit judges at chambers, but that whatever proceedings come before a judge at chambers are in the circuit court.

Section 1138 provides for the terms of the circuit courts of the respective circuits.

Section 1146 reads:

"Provided, however, that the powers and jurisdiction of circuit courts and of circuit judges in chambers relating to causes of a civil nature as hereinbefore defined, shall be limited as follows."

(Here follow the provisions with reference to the circuit in which the several matters specified shall be tried.)

Section 1151 reads:

"The several circuit judges shall have power to administer oaths and to compel the attendance of parties and witnesses from any part of the Republic, and the production of books, papers and accounts, to make and award all such judgments, decrees, orders and mandates, to issue all such executions and other processes, and to take all other steps necessary for the promotion of justice in matters pending before them in chambers, and to take all other steps necessary to carry into full effect all the powers which are or may be given them by laws of the Republic, in like manner as the circuit court may do in term time."

Section 1181 reads:

"The clerk shall have charge of the records and business in the Honolulu office, one deputy clerk shall be assigned to each circuit judge of the first circuit, and there shall be

one or more deputy clerks assigned to each of the other circuit courts."

Section 1182 reads:

"The clerks of the courts of record of the Republic shall have power to issue process, administer oaths, take depositions, tax costs and perform all other duties appertaining to their office. They shall also be *ex officio* masters in chancery. A clerk shall attend and record the proceedings at all sittings of courts of record, and in proceedings before a circuit judge in chambers shall, if there is no official reporter in attendance, record the oral evidence adduced when so required by the judge."

Section 1183 reads:

"The several clerks of the judiciary department shall have the custody of all records, books, papers, money and other things pertaining to the courts where they are assigned for duty."

Section 1184 provides that there shall be kept in Honolulu proper registers and indexes of the business of all the courts of record of this Republic.

Section 1185 provides that each court of record shall have a seal, which shall be in the custody of the clerk of such court, and shall be impressed upon all processes and official certificates, accompanied by the clerk's official attestation.

Section 1518 provides that "on all appeals from a decision of a probate judge at chambers, whether the same be tried before the jury or before the court without the intervention of a jury, the record of the court below may be read as testimony," &c.

Section 1519 reads:

"In all cases in which any person, whether a citizen of this Republic or otherwise, shall decease in any part of this Republic, leaving a will * * * it shall be incumbent upon the person named as executor of such will * * *

to apply to some judge of a court of record at chambers for probate of such will," &c.

Section 1520 reads:

"It shall in like manner be incumbent upon the person entitled and desirous to administer upon the estate of any person dying intestate in this Republic, to apply by petition to some judge of a court of record at chambers, for power to administer thereon."

Section 1502 provides that all applications for the foreclosure of mortgage, for partition and division of real property, shall be by sworn petition addressed to some court, or justice having jurisdiction thereof.

Section 1503 provides that in all cases not demanding secrecy or occasioning doubt the court or judge may, &c.

Section 1504 provides that process shall be served in such manner as the court or judge may direct, and the court or judge may direct publication of summons.

Section 1505 provides that the judge or court may assess the amount due upon mortgages.

Section 1512 provides that the justice may hear the controversy without the intervention of a jury, or he may cause the jury to be impaneled.

Section 1515 provides that matters of probate and of administration shall be heard and determined by the judge or court having jurisdiction thereof, without the intervention of a jury.

Section 1516 provides that any person claiming before any judge, sitting as a court of probate, any interest in the estate of a deceased person who may deem himself aggrieved by the decision of such probate judge at chambers may appeal.

Section 1517 provides that the appellee may likewise move the court that any issue of fact may be tried by the jury.

Section 1518 provides that on all appeals from a decision

of a probate judge at chambers the record of the court below may be read as testimony.

Section 1519 provides that in case of death it shall be incumbent on the person named as executor in the will to apply to some judge of a court of record at chambers for probate.

Section 1520 provides that any person desiring to administer on an intestate estate shall apply by petition to some judge of a court of record at chambers.

Section 1525 provides that an executor or administrator shall advertise for as long a time as the court shall direct.

Section 1528 provides that the court or judge shall have power to issue letters rogatory.

The preamble to section 1529 speaks of the probate courts of this Republic, and is referred to in the same manner in section 1529.

Section 1493, page 576, Civil Laws, speaks of copies and exemplifications of the probate of a will had before a judge or court having probate powers. The supreme court has repeatedly held that a judge sitting at chambers in probate is a court of record.

See—

In re Estate Wm. Brash, 15 Hawn., 372, p. 376.
Hoare *v.* Allen, 13 Hawn., 257, p. 262.
Aldrich *v.* First Judge, 9 Hawn., 470.

It is plain from the foregoing references to our statutes and constitution that the narrow meaning sometimes given to the word "chambers" does not prevail in the Territory of Hawaii. Here the circuit judges in the trial of matters of probate and equity at what is known as "at chambers" act as a court. They decide upon the merits of the case and do not merely act upon matters collateral to the main issue.

The words "circuit judges in chambers" and the word "court" are used as convertible terms. To hold to the contrary would not only violate common sense but also the

uniform practice of the courts of this Territory from the very organization of the government of these islands. The absurdity of such a contention is apparent when we come to consider the effect that would follow such a construction. The result would be that there has never been a legal tribunal in this country with power to try equity and other matters determinable by a judge of the circuit court, other than law matters in term time. To even suggest such a proposition is so monstrous that it ought not to receive patient consideration by the court. From the language of the supreme court in its decision in this matter, page 251, Advanced Sheets Haw. Rep., volume 16, "it would be preposterous to hold that the statutes conferring or defining such jurisdiction of judges at chambers would be void under our Hawaiian constitutions, or immediately prior to the enactment of the organic act."

Defendants in error pay little regard to the names that are given things. It is immaterial to them whether the court in which the petition for removal is pending is styled the circuit court, before a circuit judge at chambers, or probate court or judge. If the matter is properly pending in the tribunal that has jurisdiction, the name that is given this tribunal is entirely immaterial. It may be admitted for sake of argument that it has been the general custom, when we speak of the circuit court, to mean the circuit court sitting in term time, but this does not preclude the broader meaning which has been provided for by the statutes already referred to—that is, the circuit court as it exists in all its branches, including term, equity, and probate.

ORGANIC ACT.

In considering this branch of the subject it must be constantly kept in mind that the constitutional and statutory enactments hereinbefore referred to were in existence long prior to the organic act. It is not the case of the enactment

of a statute subsequent to the organic act, which could not have been specifically within the intention of the framers of that act. With this proposition clearly in mind we turn to the organic act for the purpose of ascertaining the intention of Congress with reference to the judiciary system of Hawaii. Did Congress intend to wipe out by far the greater part in importance of the laws of Hawaii, and deprive every citizen of his constitutional right of due "process of law" in all the cases in equity and probate which vastly exceed in their pecuniary character all other cases together coming within the jurisdiction of the courts. If Congress had any such diabolical intention it is quite apparent that such a law would be in violation of the Constitution of the United States, and therefore inoperative. It is insulting to Congress to impute to it any such intention.

Plaintiff in error has confined himself to an attack upon section 81 of the organic act. This is entirely misleading and unwarranted by authority, for in arriving at the intention the entire act must be considered.

Attention has already been called to the fact that the matter of the estate of Annie T. K. Parker was pending in the courts long prior to the organic act, and thus was a continuing matter (see Guardianship of Long Minors, 7 Haw., 368, on page 373), and therefore this writ of error must be dismissed for the reason that special provision is made in section 10 of the organic act for matters then pending in the courts as follows: "All such proceedings, all actions at law, suits in equity and other proceedings then pending in the courts of the Republic of Hawaii shall be carried on to final judgment and execution in the corresponding courts of the Territory of Hawaii." We might stop at this point with perfect confidence; but inasmuch as the question is of great importance to the entire Territory, it is very desirable that this Supreme Court shall give a decision on the merits and put the question at rest forever.

Section 6 of the organic act provides that all laws of

Hawaii not inconsistent with the Constitution or laws of the United States or the provisions of this act shall continue in force, subject to repeal or amendment by the legislature of the Territory of Hawaii.

Section 7 of the organic act provides that the constitution of the Republic of Hawaii and the laws of Hawaii, as set forth in the following acts, chapters, and sections of the Civil Laws, Penal Laws, and Session Laws, and relating to the following subjects, are hereby repealed; then follows a lengthy enumeration of the laws repealed, which in no way affect the provisions of the statute giving probate and equity jurisdiction to the circuit courts.

Section 10 of the organic act provides, as hereinbefore stated, that all actions at law, suits in equity, and other proceedings then pending in the courts of the Republic of Hawaii shall be carried on to final judgment and execution in the corresponding courts of the Territory of Hawaii. We have in this section an express recognition of the existence of courts of equity in the Territory of Hawaii, and a recognition by implication of the existence of courts of probate in the Territory of Hawaii in the words "and other proceedings." Is anything plainer needed than the express words of this statute to show that the courts, equity and probate, as well as other courts, should exist after the organic act in the same manner as they existed prior to the organic act?

Section 81 of the organic act provides "that the judicial power of the Territory shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish, and until the legislature shall otherwise provide the laws of Hawaii heretofore in force concerning the several courts and their jurisdiction and procedure, shall continue in force except as herein otherwise provided." Opposing counsel contend that the circuit courts referred to here are the circuit courts in term, which have cognizance of law matters only; that the ex-

ception "except as herein otherwise provided" is limited to section 81, and from these propositions their extraordinary construction is arrived at. Our contention is that the phrase "circuit courts" is used in the same sense as in the statutes, including the powers of the circuit judges in equity as well as in probate, which powers are conferred by the use of the word "chambers," and that the provision "until the legislature shall otherwise provide" means just exactly what it says, and that all the laws remain in force, and not a part of them; that the phrase "except as herein otherwise provided" refers to the organic act. As there is no exception contained in paragraph 81, to say that the phrase "except as herein otherwise provided" refers only to section 81 is absurd and meaningless. If the phrase "except as herein otherwise provided" refers to the entire organic act, it refers to the repeal of laws under section 7 and to sections 83 and 84. It might have been just as well to have used the same expression found in section 6, "the provisions of this act," but it is submitted the meaning would not have been made clearer. Even if the narrow meaning of confining the words "except as herein otherwise provided" to section 81 should be adopted, it is still equally clear that the expression "circuit courts" refers to the courts as they existed prior to the organic act; that the words "in chambers" should have the same meaning as given to them in Hawaii prior to the organic act in designating courts exercising equity and probate powers.

Section 83 provides that the laws of Hawaii relative to the judiciary department, including civil and criminal procedure, except as amended by this act, are continued in force, subject to modification by Congress or the legislature. To have suited opposing counsel, this section should read that "the laws of Hawaii relative to the judiciary department, including civil and criminal procedure, except as amended by this act, and also except laws regulating the

procedure in equity and probate, all provisions referring to the same being hereby repealed, are continued in force."

Independently of the construction which has been placed upon the words "in chambers" in Hawaii, it is submitted that the words "circuit courts" mean the courts referred to in the expression "in chambers." In Wilcox *v.* Wilcox, 14 N. Y., 577, the court held that a subsequent act establishing special terms did not prevent the former practice of the courts in equity cases hearing and deciding matters in chambers.

See also—

Presley *v.* Lamb, 105 Ind.
Granite Mining Co. *v.* Weinstren, 7 Mont., 349; 17 Pac., 108.
O'Bear *v.* Littler, 59 Ga., 584; 4 S. E., 914.
Pease *v.* Waggoner, 20 S. E., 637.
Stuart *v.* Daggey, 13 Neb., 290; 13 N. W., 309.

After all, as a Massachusetts court has said, chambers is only a place where the court sits without a jury.

Commonwealth *v.* McLaughlin, 122 Mass., 449.

The cases cited by opposing counsel in opposition to this last proposition are:

Spencer Creek Water Co. *v.* Vallejo, 48 Cal., 70.
Risser *v.* Hoyt, 53 Mich., 185.
Toledo Railway Co. *v.* Dunlap, 47 Mich., 456.
Rowe *v.* Rowe, 28 Mich., 353.
Pittsburg, &c., Ry. Co. *v.* Hurd, 17 Ohio State.
State *v.* Woodson, 161 Mo., 444.

It will be seen that all these cases are controlled by their own peculiar circumstances and do not apply.

Nothing could be more significant in considering the question as to whether or not the laws conferring jurisdiction in equity and probate upon circuit judges were repealed than the provisions of section 7 of the organic act, which specifically repeals all the laws that are intended to be repealed, leaving unrepealed all laws under which circuit judges of chambers assume jurisdiction of equity and probate matters. It could not have been the intention of Congress to deprive us of a chambers jurisdiction, as provided in our civil laws. Such an intention would be violative of our constitutional guaranty of due process of law.

The fact that all the objectionable statutes were specifically repealed makes it conclusive that no such intention existed.

There would be anarchy in case the courts of equity and probate were divested of their power.

That such an intention would violate the constitution, see—

Brannon, 14th Amendment, pp. 1-64-'5-97-147-285.

"A proceeding in equity is due process of law."

McLane *v.* Leicht, 69 Iowa, 401; 29 N. W., 327.

"The bills of rights in the American constitutions have not been drafted to secure old principles against abrogation or violation. They are conservatory rather than reformatory instruments."

Weimer *v.* Bunbury, 30 Mich., 201.

The organic act must be considered in the same light as a State constitution.

"In seeking to interpret the meaning of a constitutional provision, the intent of the framers of the instrument should, if possible, be ascertained and carried out."

Bourland *v.* Hildrith, 26 Cal., 161.

People *v.* Leonard, 73 do., 230.

Hills *v.* City of Chicago, 60 Ill., 86.

"Constitutions must be construed if possible so as to give force and effect to each provision."

Cohen *v.* Wright, 22 Cal., 293.
French *v.* Teschemaker, 24 do., 518.
Marye *v.* Hart, 76 do., 291.
Livesay *v.* Wright, 6 Colo., 92.
People *v.* Garner, 47 Ill., 246.
Dyer *v.* Bayne, 54 Md., 87.
State *v.* McCornwell, 8 Neb., 28.
Norton *v.* Bradham, 21 S. C., 375.
Lastro *v.* State, 3 Tex. App., 363.
Cordova *v.* Same, 6 do., 207.

"The remark of Lord Bacon that 'as exceptions strengthen the force of a general law, so enumeration weakens as to things not enumerated' expresses a principle of the common law, applicable to the constitution, which is always to be understood in its plain, untechnical sense."

Page *v.* Allen, 58 Pa. St., 338.
S. C., 98 Am. Dec., 272.

"Courts scrupulously regard the substance of an act in passing on its constitutionality, and give only a secondary consideration to the form in which it is expressed."

Rutgers *v.* City of New Brunswick, 42 N. J. L., 51.

"The constitution should receive a fair and liberal interpretation, so that the true objects of the grant may be promoted, *and the Government left* in the full and free exercise and enjoyment of all its rights, privileges and immunities."

State *v.* Ashley, 1 Ark., 513.

"On constitutional questions where the human reason may pause and the judgment be suspended on account of the uncertainty in the language employed, broad considerations of expediency are not to be overlooked."

City of Baltimore *v.* State, 15 Md., 376.

"A construction of a constitutional amendment, which must necessarily occasion great public and private mischief, must never be preferred to a construction which will occasion neither, or neither in so great degree, unless the terms absolutely require such preference."

In re Greffin, Fed. Cas. No. 5815.

"A word having a meaning established by judicial construction when used in a new State constitution must be taken to be used in that established sense."

Jenkins *v.* Ewin, 55 Tenn., 456.

"In construing the constitution the court must take into consideration the circumstances attending its adoption, and what appears to have been the understanding of those who adopted it, keeping always in view the proper office of the constitution, which is to declare general rules and principles, and to leave to the legislature the duty of preserving or enforcing them by appropriate regulations."

Bandel *v.* Isaac, 13 Md., 202.

"The constitution is to be interpreted with reference to the previous legislation of the State, and powers always previously exercised by the legislature remain to them, unless expressly or impliedly prohibited to them."

City of Baltimore *v.* State, 15 Md., 376.

"Constitutions are to be construed as the people construed them in their adoption, if possible; and the public history of the times should be consulted, and should have weight in arriving at that construction."

People *v.* State Treasurer, 23 Mich., 499.

"Contemporaneous legislative construction will be considered in determining the constitutionality of legislative enactments."

Burgoyne *v.* Board of Sup'rs of San Francisco County, 5 Cal., 23.
Livesay *v.* Wright, 6 Colo., 92.
Bunn *v.* People, 45 Ill., 398.
Collins *v.* Henderson, 74 Ky. (11 Bush), 74.
State *v.* Parkinson, 5 Nev., 17.
Cordova *v.* State, 6 Tex. App., 207.

"Where questions of constitutional construction are doubtful, courts will defer to the construction made by the legislature."

Kendall *v.* Kingston, 5 Mass., 534.
Jackson *v.* Board of Supervisors, 34 Neb., 680; 52 N. W., 169.
Hedgcock *v.* Davis, 64 N. C., 650.

"Contemporaneous construction of a constitutional provision as evidenced by the popular understanding of its meaning at the time is of little force, but the practical applications of its provisions at the time of their adoption furnish strong presumption that such construction rightly interprets the intention."

McPherson *v.* Secretary of State, 92 Mich., 377; 52 N. W., 469; 31 Am. St. Rep., 587; 16 L. R. A., 475.

"A word having a meaning established by judicial construction, when used in a new State constitution, must be taken to be used in that established sense."

Jenkins *v.* Ewin, 55 Tenn. (8 Heisk.), 456.

"Where the words employed in a constitution, when taken in their ordinary signification, embody a definite meaning, which involves no conflict with other parts of the same instrument, the court has no authority to refer to extrinsic matters tending to show that a different meaning was intended."

Hills *v.* City of Chicago, 60 Ill., 90.

"The fact that const., art. 12, par. 15, has its place under an article headed 'Education,' is of no significance as to the meaning and intent of that part relating to county officers generally, as is shown by the proceedings of the constitutional convention."

State *v.* Barnes, 24 Fla., 29; 3 South., 433.

"The construction of the constitution adopted and acted on by the legislature, and acquiesced in by the people for many years, is entitled to great weight with the courts."

State *v.* Gerhardt, 145 Ind., 439; 44 N. E., 469.

City of Faribault *v.* Misener, 20 Minn., 396 (Gil., 347).

Moers *v.* City of Reading, 21 Pa. St. (9 Harris), 188.

"Where a statute has been long acquiesced in, and acted upon without question, and great interests are involved under it, the court will hesitate long before disturbing it,

and will not then do so unless fully convinced that it is in violation of the fundamental law of the State."

Carson *v.* Smith, 5 Minn., 78 (Gil., 58); 77 Am. Dec., 539.

"After the organization of a county and its general recognition throughout the government of the State, and after it has been represented in several sessions of the legislature, it is contrary to public policy to hold such organization void on account of the want of power to erect such a county."

Rumsey *v.* People, 19 N. Y., 41.

"While the fact that enactments have been sanctioned by long continued and unquestioned exercise of the power conferred thereby is not conclusive on the question of their constitutionality, yet it will have much weight with the court in determining such question."

Wallack *v.* City of New York, 3 Hun., 84.

"The fact that the act providing that certain offenses may, at the election of the defendant, be tried by a justice of the peace and six jurors has been in operation in at least two counties for over twenty-one years, and in many counties for about ten years, and has never been called in question, is persuasive evidence that the act is not in conflict with the constitution."

Lavery *v.* Commonwealth, 101 Pa. St., 560.

"A constitution must be interpreted rather with reference to its special and general intent, and the ordinary and usual course of the phraseology than to the literal and technical meaning of the words used."

People *v.* Faucher, 50 N. Y., 288.

Respectfully submitted,

J. S. Low,
Guardian ad Litem and Next Friend of
Annie T. K. Parker.

Dated Honolulu, *January* 31, 1905.

Supreme Court of the United States.

No. 442.—October Term, 1904.

Alfred W. Carter, Guardian, Plaintiff in Error, vs. George D. Gear, Circuit Judge, &c. } In error to the Supreme Court of the Territory of Hawaii.

[April 3, 1905.]

This was a writ of error to review a judgment of the Supreme Court of the Territory of Hawaii denying a writ of prohibition.

The facts of the case are substantially as follows: On July 27, 1904, one Low, as next friend of Annie T. K. Parker, a minor, filed a petition before the defendant, George D. Gear, judge of the First Judicial Circuit, in probate, at chambers, asking for the removal of Alfred W. Carter, plaintiff in error, as guardian of the estate of said minor. He had been originally appointed such guardian September 29, 1899. The petition was entitled "In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. In Probate. At Chambers," and was in fact filed before the Circuit Judge sitting at chambers. A demurrer was interposed to the petition upon the ground that the Circuit Judge had no jurisdiction of the proceedings, for the reason that the statute conferring judicial powers upon the judges at chambers was in conflict with the Organic Act of the Territory.

The demurrer was overruled and the jurisdiction of the Court sustained, apparently with some doubt, by the Circuit Judge.

This petition for a writ of prohibition was then filed by Carter in the Supreme Court of the Territory against the defendant, Gear, as Circuit Judge, and Low, the next friend of Annie T. K. Parker, praying that the said Circuit Judge be prohibited from taking further cognizance of the petition for the removal of Carter, or proceeding therein until the further order of the Supreme Court. After a full hearing the Supreme Court affirmed the judgment of the Circuit Court, and dismissed the petition.

Mr. Justice Brown delivered the opinion of the Court.

The writ of prohibition was demanded upon the ground that there was no cause pending in the Circuit Court of the First Circuit, to which the motion and petition of Low, as next friend, was incidental or ancillary, and that Judge Gear, sitting at chambers, was hearing questions of a judicial nature entirely independent of any cause pending in that court.

The single question presented by the record is whether the statutes of the Territory of Hawaii, purporting to confer upon the judges of the

several courts, at chambers, within their respective jurisdictions, judicial power not incident or ancillary to some cause pending before a court, were in conflict with Section 81 of the act of Congress approved April 30, 1900, (31 Stat. 141,) commonly known as the Organic Act of the Territory. This section, page 157, enacts that "the judicial power of the Territory shall be vested in one Supreme Court, Circuit Courts, and in such inferior courts as the Legislature may from time to time establish. And until the Legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the several courts and their jurisdiction and procedure shall continue in force, except as herein otherwise provided."

At the time the act of Congress was passed there was in force in the Territory of Hawaii an act known as Chapter 57 of the Laws of 1892, the thirty-seventh section of which gave to the judges of the several Circuit Courts, at chambers, very ample powers, in admiralty, equity, bankruptcy and probate causes, among which were proceedings "to remove any executor, administrator or guardian." This act was conceded to be sufficient to justify the action of Judge Gear in removing the guardian in this case. It was substantially re-enacted with amendments in 1903.

The argument is made that Section 81 of the Organic Act is identical with the constitutional provisions of many States, under which similar statutes purporting to confer judicial powers upon Circuit Judges at chambers, not incident to or ancillary to any cause pending in any court, have usually been declared unconstitutional; citing *Spencer Creek Water Co.* v. *Vallejo*, (48 Cal. 70;) *Risser* v. *Hoyt*, (55 Mich. 185;) *Toledo Ry. Co.* v. *Dunlap*, (47 Mich. 456;) *Rowe* v. *Rowe*, (28 Mich. 353;) *Pittsburg &c. R. R. Co.* v. *Hurd*, 17 Ohio St. 144, 146;) *State* v. *Woodson*, (161 Mo. 444.) We are also referred to *McKnight* v. *James*, (155 U. S. 685,) in which we held that a writ of error could not go to an order of a judge of a Circuit Court made at chambers.

But conceding the correctness of these decisions under the Constitutions of the several States, and also conceding that the Organic Act stands in the place of a constitution for the Territory of Hawaii, to which its laws must conform, does it follow that the laws respecting proceedings at chambers are in excess of the powers conferred under the Organic Act?

Bearing in mind that Section 81 of the Organic Act is but one of a hundred sections, all of which are entitled to equal respect, it is evident that to obtain a comprehensive view of the intention of Congress we are bound to consider the whole act so far as it relates to the disposition of judicial power. To segregate section 81 from all the other provisions of the act must necessarily result in giving it undue prominence.

By Section 6, "the laws of Hawaii not inconsistent with the Constitution and laws of the United States or the provisions of this act shall continue in force, subject to repeal or amendment by the Legislature of Hawaii,

or the Congress of the United States." By Section 7 the Constitution of the Republic of Hawaii and a large number of its laws, specially enumerated, are repealed, but the statutes giving probate and equity jurisdiction to the Circuit Courts are not mentioned.

By Section 10 all actions at law, suits in equity and other proceedings then pending in the courts of the Republic of Hawaii shall be carried on to final judgment and execution in the corresponding courts of the Territory of Hawaii. As petitioner Carter was appointed guardian of the minor's estate in 1899 by the then judge of the First Circuit, and was still proceeding to wind up the estate, we think the petition for his removal was filed in a pending proceeding within the meaning of this section.

Now, as it appears that the powers of judges at chambers had been fixed since 1892, eight years before the Organic Act was passed, that by Section 6 and the final clause of Section 81 the laws of Hawaii theretofore in force concerning the several courts and their jurisdiction and procedure were continued in force, except as therein otherwise provided, it would seem that these provisions were especially intended to apply to cases like the present, where a system of procedure which had previously existed was recognized as valid and still existing. In *Hawaii* v. *Mankichi*, (190 U.S. 197,) a similar provision in the resolution of annexation was held not to abrogate a system of trials by information and convictions by a non-unanimous jury, as applied to cases prior to the Organic Act of April 30, 1900.

But we do not think it necessary to go further than Section 81 itself to find authority for a recognition of the laws previously existing in Hawaii concerning the constitution of its Courts and their method of procedure. Whether a petition to a Circuit Court acting as a court of probate shall be addressed to and passed upon by the judge while sitting in court at chambers is, after all, much more a matter of form than of substance. (*Commonwealth* v. *McLaughlin*, 122 Mass. 449.) The petition for the removal of the guardian in this case is entitled "In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. In Probate. At Chambers." It appears to have been heard by the Circuit Judge without a jury, his decision being entitled "Before a Judge of the Circuit Court, of the First Circuit, Territory of Hawaii." It must doubtless be treated as a proceeding at chambers, but for reasons already given we think the power to act at chambers was saved by Section 81 continuing in force the previous laws of Hawaii concerning the Courts and their procedure. It would be too narrow a construction to hold that this did not include the procedure before judges of those courts sitting at chambers.

The decree dismissing the writ is *Affirmed*.